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ASPECTS OF ALBERTA'S MANAGEMENT OF PROVINCIALLY OWNED PETROLEUM AND NATURAL GAS

by

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DEDICATION

This thesis is dedicated to my parents

ABSTRACT

This thesis describes and analyzes aspects of how the Alberta government controls the development of provincially owned petroleum and natural gas. The government does not develop these public resources through a provincially owned corporation so it must attract and sustain the capital of private investors. It does so by offering the right to explore for, develop and produce petroleum and natural gas belonging to the province. Private industry profits from its exploitation of provincially owned petroleum and natural gas and to some extent the government and industry are partners in the business of ensuring a stable and economic energy supply.

The interests of government and industry, however, diverge on more grounds than they meet. They have different economic interests and the government operates under strictures of political accountability. To govern effectively, the Crown must retain the flexibility required to meet changing societal needs but to attract private capital it must offer security of tenure to prospective investors. The tenure regime and regulatory system adopted by a government illustrate how it attempts to balance these competing needs.

The purpose of this thesis is to show how the Alberta government retains flexibility by the contractual provisions it inserts in petroleum and natural gas licences and leases, by its

discretionary decision-making powers under the Mines and Minerals Act, and its legislative power to retroactively alter licence and lease terms. Each of these mechanisms has an individual effect on an interest holder's security of tenure and cumulatively they suggest that interest holders enjoy few legal protections. The Alberta system emphasizes government flexibility to such an extent that it is likely that the proven nature of the province's resources and the established reputation of the Alberta government, rather than the security of tenure offered by documents authorized and executed under the Mines and Minerals Act, are the key factors which attract and sustain private investment in this province.

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CHAPTER I

INTRODUCTION

A major problem of natural resources law concerns the ability of governments which grant resource rights to secure the flexibility they require to meet changing societal needs. A government will sometimes argue that because of changed circumstances it should no longer be bound by its contracts. The Opec nations relied on this argument when they proclaimed that disadvantageous concession agreements were no longer binding. The "changed circumstances" argument is advanced when a government feels that certain contracts or certain contractual provisions no longer best protect its interests. Recent Alberta examples in the oil and natural gas field include the production cutbacks, royalty revisions and the reversion of unused deep drilling rights. Governments desire flexibility to meet changed circumstances. This sometimes requires alterations to existing agreements.

The greatest impediment to government flexibility is the vested rights granted to holders of resource interests. The Crown grants these interests because it relies on private industry to develop provincially owned resources. Industry representatives require security of tenure to facilitate financing and to judge the venture's commercial viability. The existence and extent of security of tenure can be judged by the nature and content of lease and licence provisions. The government generally seeks to balance its needs against those of its grantees; this involves a

competition between flexibility on the part of the government and security of tenure on the part of industry. A government may retain flexibility in three primary ways: contractual provisions in its grants; discretionary decision-making powers; and its legislative power to retroactively alter the terms of grant. Each has legal and political implications and their existence and effects interrelate.

This thesis discusses how the Alberta government uses these three mechanisms to ensure freedom of executive action and the effect these mechanisms have on the security of tenure offered to potential investors. This discussion is placed in context, in Chapter II, by reviewing provincial ownership of natural resources, the extent to which the Crown can bind itself by contract, and salient constitutional limitations. Petroleum and natural gas leases and licences are analyzed to determine whether they grant contractual or proprietary rights or whether lessees and/or licensees merely enjoy a statutory status. This difference is important as the legal nature of an interest affects security of tenure and determines whether a grantee has "rights" and the manner in which those rights can be altered in the future.

Chapter III shows how the government currently uses contractual provisions to retain freedom of action. The most important is the "compliance with laws" clause as it allows the unilateral variation of most, and perhaps all, contractual terms. The

variable royalty provision also permits unlimited changes in the royalty rate. I study each of these contractual provisions to evaluate how effectively they secure government flexibility and their effects on a grantee's security of tenure.

Chapter IV discusses the discretionary decision making powers retained by the government over petroleum and natural gas exploration, development and production. The level, frequency and nature of this discretion determines whether grantees receive rights or statutory privileges. In this way there is an overlap between Chapters III and IV, but discretion is a separate way to respond to changed circumstance. Discretionary powers are desirable from a government's viewpoint because if they are used properly there will be no violation of existing rights and no claims for compensation for expropriated interests. The presence of discretion, especially if it is unfettered, is undesirable from the interest holder's viewpoint because it introduces uncertainty. The role of discretion is discussed and examples are taken from the Mines and Minerals Act and Regulations. The effect of discretion on a grantee's administrative remedies is briefly presented.

The fifth Chapter outlines the legal and political consequences of subsequent legislation which alters or expropriates vested interests. Resort to legislative sovereignty is the government's most potent response to changed circumstances but it poses the greatest threat to security of tenure. The extent of

that threat will depend on how often this power is used and whether it is invoked with or without compensation. This is the third mechanism the government uses to retain flexibility. It relates to the first two as the Crown need not resort to retroactive legislation if the desired changes can be made through contractual terms or statutory discretion. The Crown will only invoke its legislative capacity when these other mechanisms are inadequate. The effect of subsequent legislation on acquired rights depends upon whether it is confiscatory in nature and upon whether any "rights" were granted by the government. The latter question turns on the legal characterization of the rights held by the interest holder.

The use of legislation to alter vested rights raises many legal issues. It is trite law that the Crown may expropriate private rights, even without compensation, if it does so expressly, but in most cases there is no express provision either granting or refusing compensation. Interest holders are keenly interested in how far the manner and form presumptions concerning retroactive legislation protect their rights. They want to know what level of interference amounts to an expropriation and when they are entitled to compensation for their losses. The right to compensation may be based upon the terms of the confiscatory statute, the provincial expropriation law or perhaps, the common law. It is in the areas of expropriation and compensation that

the greatest legal uncertainties persist. These are the issues addressed in Chapter V.

Chapter VI reviews and classifies Alberta's regulatory and tenure system for petroleum and natural gas rights by reference to the competing needs of flexibility and security. Concepts or practices used in other legal systems are presented where appropriate. In each chapter, the production cutbacks, the royalty increases and the deep rights reversion are used, where appropriate, as examples of recent changes in government policy.

It should be noted that all mechanisms designed to promote flexibility have political as well as legal effects. The breadth of the government's strict legal rights is narrowed by political considerations. The Crown must ensure that the province's investment climate promotes the recovery of a sufficient and stable energy supply and encourages the necessary capital expenditures. This means that contractual provisions must provide security of tenure to attract interest holders, statutory discretion must be exercised wisely to ensure continued investment and retroactive and confiscatory legislation cannot be used frequently or capriciously or investor confidence will be diminished. The following discussion should, therefore, be read against the reality that the government must seek the capital of private investors.

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CROWN CONTROL OVER NATURAL RESOURCES

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CHAPTER II

CROWN CONTROL OVER NATURAL RESOURCES

Introduction

This chapter outlines some general issues raised by the Crown's control over provincially owned natural resources. The nature and extent of the Crown's ownership is briefly presented to determine if, and to what extent, the Crown's right to alienate its resources is limited, and to ascertain the legal nature of rights the Crown is capable of granting. There is also a short introduction concerning the dual capacity of the Crown in contractual arrangements in order to place the rest of the chapter in context.

A brief discussion of whether or not the Crown can bind itself by contract is needed to determine the limits to the Crown's contractual capacity. This is followed by an introduction to the general scheme of the Alberta Mines and Minerals Act. The legal nature of the rights granted by licences and leases is studied by asking whether they merely bestow a statutory status on licensees or lesses or whether they grant contractual or proprietary rights. The legal nature of these interests will determine whether any contractual security of tenure is conferred by the Crown and whether any property rights vest in grantees. In this context it is important to note that only if property rights have

vested can any argument be made that there has been an expropriation requiring compensation.

A. Provincial Control Over Natural Resources

The Crown, in right of the province, owns certain natural resources within its boundaries. In Alberta, ownership and control over natural resources results from the Natural Resource Transfer Agreement of 1930[1] and the Canada Act, 1982.[2] The former transferred public lands and mines and minerals from the Dominion government to the province and the latter expanded provincial jurisdiction over non-renewable resources.[3] Although the Crown owns these resources, the level of ownership possible in fugacious substances, such as petroleum and natural gas, may effect the extent of the grantee's interest[4] because the Crown cannot grant rights it does not possess. The ownership rights necessary for the Crown to transfer in situ interests can be founded upon the general legal principle which recognizes ownership of fugacious substances before they are reduced to

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1. British North America Act, 1930, 21 Geo. V.C. 26 (Imp).

2. The Canada Act, 1982.

3. Id., s. 92A.

4. For a discussion of the Texas, Pennsylvania and Oklahoma theories see J. H. Laycraft and Ivan L. Head, "Theories of Ownership of Oil and Gas" (1953) Can. Bar Rev. 382.

possession,[5] or it can be argued that the Transfer Agreement vested these substances absolutely in the Crown.[6] Either of these arguments suggests that no limitation on the Crown's power to alienate is generated by the nature of the resource.

Alberta's power to dispose of provincially owned resources is limited by the formal requirements of the Mines and Minerals

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5. The theory that oil and gas may be owned, subject to the rule of capture, was adopted by the Privy Council in Borys v. C.P.R. (1952) 7 W.W.R. 546. Support for the stated proposition may be found in Lord Porter's judgement at pp. 229 and 232. Secondly, it is implicit in the judgement that the C.P.R. owned the petroleum in situ. This decision has been criticized as internally inconsistent. See M. MacIntyre, "The Development of Oil and Gas Theory in Canada" (1969) 4 U.B.C. Law Rev. 245.

   Further cases include the Supreme Court's decision in McColl-Frontenac Oil Co. v. Hamilton (1953) S.C.R. 127. Ownership rights before possession was also recognized in both the In Re Heier Estates (1952-53) 7 W.W.R. (N.S.) 385 and Berkheiser v. Berkheiser [1957] S.C.R. 387, 7 D.L.R. (2d) 721 decisions. The cases characterized the leases in question as a sale and a profit a prendre respectively. Working from the nemo dat principle the operative assumption of the Heier decision was that the grantor owned the oil and gas in situ. The Berkheiser decision is perhaps not as wide, because ownership of the right to work whatever oil and gas lay in situ would have supported the finding of a profit a prendre. It is submitted however, that if the Crown's ownership is properly determined by reference to the general law, the preponderance of authority recognizes ownership in situ of petroleum and natural gas.

6. A. Gervais, "The Nature of the Interest Granted Under Alberta Crown Petroleum and Natural Gas Leases." Unpublished paper, April 1981 at 20. Natural Resource Law Practicum, University of Calgary. The assumption of this argument is that statutes can create interests which are not recognized at common law.

Act,[7] the distribution of powers in the constitution[8] and the substantive requirements of the 1930 Transfer Agreement.

Section 2 of the Transfer Agreement represents an undertaking by the Province to respect the natural resource rights granted by the federal government during the currency of its stewardship. It reads:[9]

> The Province will carry out in accordance with the terms thereof every contract to purchase or lease any Crown lands, mines and minerals and every other arrangement whereby any person has become entitled to any interest therein as against the Crown, and further agrees not to affect or alter any term of such contract to purchase, lease or other arrangement by legislation or otherwise, except either with the consent of all the parties thereto other than Canada or in so far as any legislation may apply generally to all similar agreements relating to lands, mines or minerals in the province or to interest therein, irrespective of who may be parties thereto . . .

---

7. R.S.A. 1980, c. M-15 as am.

8. Supra n. 2.

9. Supra, n. 1. The Transfer Agreement Act apparently allows provincial laws of general application to vary the terms of federal grants but the extent of this exception is unclear.

This section protects Dominion grantees as their rights cannot be "affected" or "altered" by subsequent provincial legislation. It prohibits confiscatory legislative changes from taking effect so that issues of expropriation and compensation do not arise. The province, as successor in title, can exercise any contractual right to vary the contract which was retained by the federal government in the original grant. Where a contractual right was not properly retained by the federal government the Act protects resource rights in the limited cases where it applies.

B. The Dual Capacity of the Crown in Contractual Agreements

The Alberta government enjoys two distinct capacities: contractual and legislative. It possesses different powers and protects different interests under each.[10] In its contractual capacity, and as the steward of provincially owned resources, it may grant proprietary or contractual rights. As a legislative body the government is supreme and possesses the power to abrogate those rights, even without compensation, if it does so expressly. The Crown also possesses special powers and enjoys immunities which are unavailable to most contracting parties.[11]

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10. Articles which deal with the Crown's dual capacity include: Rowland J. Harrison, "The Legal Character of Petroleum Licences", (1980) 58 Can. Bar Rev. 483 and A.R. Thompson, "Sovereignty and Natural Resources - A Study of Canadian Petroleum Legislation", (1966-67) 1 Val. U.L. Rev. 283.

11. Immunities and privileges include the rule that Crown grants

In its contractual capacity, the Crown may assume binding obligations and give rise to vested rights in Crown grantees. These rights may be inconsistent with the flexibility and freedom the Crown needs to govern effectively and to respond to changing societal needs. To some extent the present practice of the Crown anticipates this problem and builds flexibility into the contract by inserting suitable contractual provisions which include the "compliance with laws" clause and the variable royalty provision. These contractual provisions allow the Crown to vary vested rights, without confiscating or expropriating them because in law it is merely exercising a contractual right to unilaterally vary the contract.

It is only when the government invokes its legislative capacity to vary vested rights that the issue of expropriation arises. An expropriation can only result from a statutory or regulatory enactment and not from the insertion or exercise of a contractual provision. The government is free to invoke its legislative capacity to vary, reduce, restrict, or confiscate contractual or proprietary rights regardless of the existence or

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are interpreted in its favor; the doctrine of executive necessity established in Rederiakliebolaget Amphitrite v. The King, [1921] 3 K.B. 500 which provides that the Crown cannot purport to fetter its future executive action by entering into contracts which limit its sovereign powers; and the special statutory procedures required to sue the Crown; see Proceeding Against the Crown Act R.S.A. 1980, c. P-18.

extent of contractual provisions promoting flexibility or authorizing unilateral variation. It can do so pursuant to its sovereign legislative powers but manner and form requirements provide that legislation purporting to alter or confiscate vested rights must do so expressly.[12] If the legislation is expropriatory, compensation claims must be based upon either the terms of the confiscatory legislation, the general expropriation statute or under the common law.[13] The government's strict legal rights are very broad and include the unlimited power to legislatively vary private rights, even without compensation.

Politically, the government must judge the effect of subsequent legislative alterations on the province's economic, investment, and political climate.[14] To ensure a stable energy supply, the government must strike a proper balance between its

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12. There are presumptions against retroactive legislation and expropriation without compensation. For an application of these presumptions, see Spooner Oils Ltd. v. Turner Valley Gas Conservation Board, [1933] 4 D.L.R. 545, [1933] S.C.R. 629. G.S. Challies, The Law of Expropriation (1963) 77. For an interesting and academic article, see Elmer A. Driedger, "Statutes: Retroactive Retrospective Reflections" (1978) 56 Can. Bar Rev. 264.

13. A common law right to compensation may have been introduced in the case of Manitoba Fisheries Ltd. v. The Queen (1979), 88 D.L.R. (3d) 462 (S.C.C.).

14. It has been argued that in light of legislative sovereignty, the grantee's only real protection lies in this political, and not the legal, remedy. See A.R. Thompson, supra note 10 at 295 and R. Harrison, supra note 10 at 485.

need for flexibility and the grantee's requirement of security of tenure. It can only do so by supplying fair contractual terms and refraining from the capricious, extravagant, or frequent use of its legislative sovereignty. In certain cases these political considerations may prevent the Crown from relying on its strict legal rights.

It should be noted that these dual capacities invoke correlative capacities in grantees. Thus, when the Crown acts in its contractual capacity, grantees are bound as contracting parties and when the government acts in its legislative capacity, grantees are bound as subjects of the Crown. When the government enacts retroactive legislation there is no doubt that grantees will be bound at least as subjects of the Crown but the government would prefer that they were bound by contractual provisions and as contractual parties in order to avoid issues of expropriation. Under a "compliance with laws" clause statutory amendments are incorporated as contractual provisions so, in relation to those grantees, the government is not acting in its legislative capacity, even though the contractual variation is based on a legislative enactment. This clause and the interaction between the government's dual capacities are the cornerstones of Alberta's system for controlling provincially owned petroleum and natural gas.

C. The Contractual Capacity of the Crown

The notion of dual capacities can be seen as a response to the need to construct a legal framework in which the Crown can be held liable for the performance of some of the obligations it assumes. As the government cannot bind itself when it acts as a legislative body, a method was sought to differentiate transactions which could and should be binding, and those which should not. For the former transactions, the Crown was said to possess a distinct contractual capacity where it could enter into binding agreements and grant proprietary or contractual rights.

It was once believed that the Crown's contractual capacity depended upon the existence and terms of an enabling statute. The following remarks are typical of this view: "It appears to be established as a general proposition that a minister of the Crown has no authority to enter into contracts on behalf of the Crown unless he has been authorized by a statute or by order-in-council so to do."[15]

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15. Walsh Advertising Ltd. v. R. (1962) Ex C.R. 115 at 114-125. See also R. Dusseault and D. Carrier, "Le Contrat Administratif en Droit Canadien et Qeubecois" (1970) 48 Can. Bar. Rev. 439 at 453-54.

The Supreme Court decision J.E. Verrault et Fils v. A.G. Quebec[16] recognized the Crown's inherent right to enter into contracts and questioned the need for a statutory authorization.[17] In theory, the Court limited the Crown's inherent capacity to ordinary contracts, incidental to recognized government functions. The nebulous nature of the distinction between ordinary and extraordinary contracts and the fact that no

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16. (1976) 57 D.L.R. (3d) 403. In the Verrault decision, the Quebec government, through the agency of the Minister of Social Welfare signed a building contract to construct a home for the elderly. Elections intervened and the new government did not want to pursue the project according to the terms arranged by its predecessor. The government issued a telegram requiring the Company to stop building. The company sought recovery of its loss of bargain damages and an amount for injury to its reputation. The government claimed that the Minister lacked the capacity to enter into the contract as his actions did not fall squarely within the terms of the authorizing statute and regulations.

    Justice Pigeon put the issue in the following manner: "It is therefore necessary to consider whether, in the absence of any statutory restriction, a minister is capable of contracting in the name of the Government." He likened the position of the Crown to that of an individual in holding that the principle of apparent mandate binds the Crown in appropriate cases. The plaintiff therefore recovered for the improper cancellation of the contract.

    If specific authorization was necessary this case would have been decided in favour of the Crown. The framing of the issue illustrates that the operative assumption was a general ability to contract. As incapacity is the exception the court properly read the statutory provisions restricting the Crown's capacity narrowly. See the comments on this decision by J. Grey (1976) 54 Can. Bar. Rev. 409 and J. Hilliard (1976) 54 Can. Bar Rev. 401.

17. This is the position in the United Kingdom. See P. Hogg, Liability of the Crown (1971) 120-125.

contract has subsequently been held to be sufficiently extraordinary to merit specific statutory authorization, suggests that this limitation is more apparent than real.[18]

The Crown's inherent right to contract is subject to limitations imposed either by mandatory legislative enactments or public policy considerations. Legislation may restrict the scope of the Crown's contracting power, the range of individuals who may properly exercise it, or the manner of its exercise. Instances may be found in the present Mines and Minerals Act.[19] After Verrault only noncompliance with mandatory statutory terms will prevent the formation of an enforceable contract.[20] This restriction has the effect of limiting the potential number of cases of invalidity as most statutory provisions are framed permissively, permitting rather than requiring the Minister to perform a wide variety of functions.

A second limitation results from public policy considerations if the judicial doctrine of executive necessity forms part of the

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18. Id., at 120.

19. See the discussion of the Mines & Minerals Act, R.S.A. 1980 c. M-15 as am. by S.A. 1981, c. 24 S.A. 1981, c. 55; S.A. 1981, CB-15; A.R. 272/82 hereinafter referred to as the Mines & Minerals Act.

20. P. Hogg, supra n. 18 at 120.

law of Alberta. The doctrine of executive necessity was first enunciated in Rederiakliebolaget Amphitrite v. R.[21] and provides that the Crown cannot enter into contracts which limit its sovereign powers or fetter its freedom of executive action. In that case the British government adopted a policy whereby neutral ships in British ports were subject to departure restrictions. The suppliants, having had two of their ships previously detained, were anxious to avoid a similar future detention. They secured an undertaking from the British Legation that their ship would not be detained and this undertaking was respected.

The suppliants wanted to make another voyage so they asked for a renewal of this undertaking and it was granted in the following terms: "The S.S. Amphitrite will be allowed to release herself in her next voyage to the United Kingdom." The suppliants relied on this undertaking and sent their ship to the British port. They were then told that clearance would not be granted unless they made a certain application but their position made the requisite application impossible. The result was that the Amphitrite was detained in Britain and eventually sold by the suppliants to avoid further financial loss.

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21. [1921] 3 K.B. 500.

The suppliants alleged that the detention constituted a breach of contract and they claimed substantial damages. Rowlatt J., in what has been criticized as "a remarkably short judgement, notably empty of authorities,"[22] held that the Crown did not have the capacity to enter into this type of agreement as it limited its future executive action. He held that the letter to the suppliants was a mere expression of intent and not a contractually binding promise as:

> "It is not competent for the Government by enforceable contract to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the state."[23]

Thus, the doctrine of executive necessity is tied to public policy considerations. The doctrine is phrased in terms of contractual incapacity so no contract would be formed in the cases where it applied. This may mean that restitutionary remedies would be available to recover for any benefits conferred upon the

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22. M. Cowan, "Contracts with the Crown (1965) 18 Current Legal Problems 153 at 166.

23. Supra n. 21 at 503.

Crown.[24] This incapacity may also invalidate specific terms, while not affecting the bargain as a whole.[25]

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24. There is no reason why a claim for the benefits conferred on the government should not be permitted. Allowing freedom of future action does not mean that accrued benefits should not be compensated.

    The parallel notion of frustration and the argument of changed circumstances also constitute attempts to balance the needs of government with the reasonable expectations of the private contracting party. In those instances the contract is formed but its execution is prevented. As the doctrine of frustration is of doubtful applicability to contracts coupled with conveyances, the holders of leases or licences may prefer to argue executive necessity.

    O.P.E.C. nations advanced the changed circumstances and frustration doctrines in an attempt to render disadvantageous concession agreements unenforceable. See H. S. Zakariy, "Sovereignty, State Participation and the Need to Restructure the Existing Petroleum Concession Regime" (1972) 10 Alta. L. Rev. 218.

25. R. Dussault and D. Carrier, supra n. 15 at 474. See also Charpentier v. The Queen [1955] S.C.R. 177. In that case, by ministerial decree the Minister of public works was authorized to pay the purchase price "together with such amounts as may be legally due by the Crown in respect of taxes or other adjustments." A contract was entered into where the Crown assumed liability for "municipal and school taxes". The Supreme Court held that as the Crown in right of Canada was not liable for these taxes under s. 125 of the British North America Act, the contractual provision could not be enforced. In light of the proviso and s. 125 the Crown lacked capacity to enter into this provision.

The Amphitrite doctrine has been repeatedly criticized[26] and in Robertson v. Minister of Pensions[27] Denning J. remarked that the doctrine of executive necessity was of limited scope. He limited its application to situations where a condition could be implied allowing policy considerations to defeat the contract. He stressed that the Amphitrite dealt with a mere expression of intention, whereas he found that an actual contract existed in the case before him. This distinction fails, or neglects, to recognize that the undertaking in the Amphitrite case was held to be a mere expression of intention because of the Crown's inability to enter into that type of public contract.[28] It is questionable whether or not the distinction propounded by Denning J. will be sustained but the Robertson decision illustrates the reluctance of courts to apply this doctrine. The current status of the doctrine of executive necessity and its application in Alberta remains unclear.

The capacity in which the Crown concludes an agreement is a question of fact requiring each transaction to be judged individually. For the purpose of this thesis I have, for the

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26. P. O'Hood, Constitutional and Administrative Law (5th ed., 552). See also M. Cowan, supra n. 22 at 166; R. Dusseault and D. Carrier, supra n. 15 at 477.

27. [1949] I K.B. 227 at 231.

28. C. Turpin, Government Contracts (1972) 21.

following reasons, accepted the generalization that present licences and leases are concluded as contractual matters and are, therefore, initially binding.[29] Firstly, decisions raising the point have assumed this to be the case[30] and secondly guidance can be taken from the decision in Re Timber Regulations.[31] The court held that a Crown permit granting timber rights was consensual in nature, and although it could not be analyzed in strict contract law terms, it was an essentially contractual instrument. Moreover, the wording in licences and leases is similar to the language used in private contracts and this suggests the Crown is acting as a contracting party and assuming binding obligations.

In conclusion, the Crown may bind itself in its contractual capacity as long as it adheres to mandatory statutory requirements. The Crown's inherent power to contract is limited by the Mines and Minerals Act and even if the doctrine of executive necessity is accepted into Alberta, it is unlikely that it will enjoy a wide application. Lastly, the Crown appears to grant leases and licences in its contractual capacity.

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29. R. Harrison, supra n. 10 at 500.

30. Spooner Oils Ltd. v. Turner Valley Gas Conservation Board (1933) 4 D.L.R. 545.

31. [1953] 1 W.W.R. 607.

D. The Alberta Mines and Minerals Act

The Mines and Minerals Act regulates the disposition of certain Crown-owned minerals by restricting the Crown's general power to deal with them. With limited exceptions, the Act applies to all naturally occurring minerals, including petroleum and natural gas.

The Act envisages two types of resource agreements: licences and leases. Both are entered into through the agency of the Minister of Energy and Natural Resources. Licences authorize the exploration and development of Crown-owned petroleum and natural gas for a limited amount of time. Although production is possible under a licence, licensees with a commercial find normally desire greater security of tenure than that afforded by licences. They therefore seek a lease in order to obtain, among other things, an interest with a primary term and a provision which ties the actual term of the lease to production. Leases grant the right to petroleum and the natural gas belonging to the Crown.

The Alberta statute establishes a two tier tenure system, involving the movement from an inferior interest (licence) to a superior one (lease). The terms and conditions of each agreement generally reflect the extent of the interest granted. Thus, lessees accept more onerous provisions in exchange for greater rights. As a regulatory vehicle, a two tier system theoretically

generates income and encourages the timely turnover of interests.[32]

The government's policy of freedom of executive action is reflected by a provision in the Act which states that all leases and licences will be governed by current laws. Section 4 reads:

> 4. Notwithstanding anything in any agreement made or entered into
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> (a) under the former Act or the regulations thereunder, or
>
> (b) under The Provincial Lands Act or Dominion Lands Act (Canada) or the regulations under those Acts and relating to a mineral,
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> every such agreement and any renewal or re-issue thereof is in every respect subject to this Act and the regulations made under this Act.

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32. The two level system has been criticized as inefficient in M. Crommelin, "Government Management of Oil and gas in Alberta" (1975) 13 Alta. L. Rev. 146 and as unnecessary when there is no Crown reserve system in A.R. Thompson and M. Crommelin, "Canada's Petroleum Leasing Policy - A Cornucopia for Whom?" Paper presented to the Canadian Arctic Resource Committee, Ottawa, 1973, at 22.

This section reflects the government's policy not to be bound by terms which circumstances have rendered disadvantageous or less than optimal. The purpose of this provision is to make sure that all agreements are regulated by current laws. This provision does not try to incorporate future laws into these agreements - that function is fulfilled by the compliance with laws clause inserted into leases.

E. The Legal Nature of the Interests Granted Under the Mines & Minerals Act

The legal nature of licences and leases determines the security of tenure enjoyed by grantees, whether they possess a statutory status or contractual or proprietary rights, and whether they possess "property" which may be expropriated by confiscatory legislation. The legal nature of licences and leases depends upon the rights they transfer and how those rights are characterized. A finding that licensees and lessees only enjoy a statutory status would severely limit their security of tenure as the status would probably be granted in the Crown's legislative capacity and this would make their position variable and retractable at the will of the Crown.

If licensees and lessees receive either contractual or proprietary "rights", then they have greater security of tenure. Before an interest holder can claim compensation for the expropriation of his rights he must first establish that he did in fact

have some. A vesting of either contractual or proprietary rights will be sufficient to support a claim for compensation but a distinction should nevertheless be drawn between them as they have different consequences in relation to security of tenure and the basis for determining compensation in the event of expropriation may differ. Where an interest holder possesses proprietary rights it facilitates financing as greater legal protection is given to interests in land than to contractual rights. Second, the availability and/or measure of compensation for expropriation may vary according to its classification as certain statutes only grant compensation rights when an interest in land is expropriated. It is therefore, important to determine whether the rights granted by licences and leases are contractual or proprietary. This requires a closer look at the rights granted by each.

1. Licences

Licences are governed by the regulations authorized by Section 106 of the Act. Licences are the initial step in the two tier land tenure system and their purpose is to encourage drilling and the accumulation of data bearing on a parcel's productive capacity. The government encourages drilling by reducing the rental payments required on certain lands where exploration is desired and by requiring licensees to drill a "lease-earning well" before they can convert to a lease.

Licences have replaced reservations and permits as the current form of exploration agreement. They grant the right to work and produce for a term of years and the right to apply for a petroleum and natural gas lease. Licences are granted by means of public tender and each tender must be accompanied by the requisite fee and the first year's rental payment. The licensee receives the "right to drill a well or wells for petroleum and natural gas that are the property of the Crown in the lands contained in the licence and the right to produce the same, subject to any exceptions expressed in the licence.[33] Possible exceptions are based upon the discretion of the Minister to set the terms and conditions of the licence.

The main reasons for seeking a licence is to obtain the right to explore, work for and produce provincially owned petroleum and natural gas. These rights are given over specific tracts of land and as licences are granted for specific terms, licensees must develop their interests quickly. The duration of a licence is a function of its location, but it may vary in length from two to four years.

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33. Petroleum and Natural Gas Licence Regulations, Alta. Reg. 169/76, as am. by Alta. Reg. 248/79, section 9.

An important section bearing on a licensee's rights is section thirteen of the Regulations.[34] It grants to the licensee who drills a "lease-earning well" the right to apply for a lease or leases covering lands contained in the licence, if the well is completed within the term of the licence, or any extension. The acreage for which a lease may be sought is determined by the location of the desired land and the depth of the "lease-earning well."[35] The statute does not define "lease-earning well" and a recent decision held that the Minister's discretion to determine its definition is absolute and not subject to judicial review.[36]

It is striking that section 13 of the Regulations speaks only of the "right" to "apply" for a lease and not a right to the actual lease itself. Section 93(1)(b), of the Act, on first reading, suggests that the holder of a licence is "entitled" to a lease, but section 93(3) gives the Minister the discretion to grant or refuse the licensee's lease application. It is, however,

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34. Id., s. 13.

35. This is set out in Schedule B. This forms part of the policy to encourage deeper drilling in the hope of duplicating West Pembina-type finds. This appears to be one aspect of a three-pronged attack to encourage deep drilling. The others include tying drilling incentive payments to depth and the introduction of the deep rights reversion sections.

36. R. v. Industrial Coal & Minerals Ltd., (1977) 4 W.W.R. 35 (1979) 5 W.W.R. 102.

Departmental practice to grant leases if the licence terms have been met. As the Minister's discretion is very wide, a literal construction of the relevant sections may mean that a licensee who paid the requisite fees and expended large amounts of time and capital drilling a "lease-earning well" could nevertheless be denied the opportunity to proceed to lease.

The apparent injustice of such a conclusion suggests an alternative construction of the sections[37] or the implication of some duty of fairness under which ministerial discretion must be exercised.[38] Even if some "right" to go to lease can be implied under section 93(3) of the Act and section 13 of the Regulations, that right is still contingent upon the drilling of a "leasing-earning well." The possibility exists that the Minister may refuse to consider a well as falling within the definition, thereby preventing the acquisition of a lease even if section 93

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37. See the Section in Chapter IV on Proceeding to Lease where it is argued that a licensee has a qualified right to a lease.

38. A duty of fairness was implied for a function which was not quasi-judicial in Coopers and Lybrand v. M.N.R. [1979] 1 S.C.R. 495, 24 N.R., 163. For a further discussion of administrative law principles see Chapter Four. The notion of good faith bargaining in contract is discussed in Kessler and Fine "In Culpa Contrahendo" (1964) 77 Harv. L. Rev. 401. Even if a good faith obligation is imposed, either by force of administrative law or of contract law principles, this would only leave the licensee with the right to have a fair appraisal of his application rather than the right to a lease.

appears to be satisfied. The argument advanced in Chapter IV questions whether the Minister has the authority to require a lease-earning well under the Regulations in light of the terms of the Act.

In conclusion, the major "rights" granted by petroleum and natural gas licences are the right to drill and produce during the currency of the licence and the right to apply for a petroleum and natural gas lease.

2. Leases

The petroleum and natural gas lease is the major instrument under which petroleum and natural gas are produced on public lands in Alberta. It governs the relationship between the government as lessor and the companies or individuals as lessees. This is often a long term relationship which normally lasts as long as extraction is commercially viable. For this reason, governments are more likely to feel the need to change the terms and conditions of leases rather than shorter term licences because it is more likely that circumstances will require either a shift in government policy or a change in the way it is implemented. The rights granted under the current lease will, therefore, be studied in greater detail than those under the licence.

Any study of tenure rights in Alberta would be incomplete without mentioning how the Mines and Minerals Act underwent a

major revision in 1976. At that time, the government sought to encourage production by enacting measures which would increase exploration activities and facilitate the turnover of dormant interests. Major changes included the substitution of licences as the form of exploration agreement, the reduction of the primary term of leases, the abolition of the Crown reserve system, the amendment to the royalty formula and the requirement that after a specified date unused deep drilling rights would revert to the Crown.

(a) The Granting Clause

The 1976 legislative amendments did not alter the major clauses which have been used in standard form petroleum and natural gas leases since 1949. Leases have generally contained a granting clause and related covenants and a compliance with laws provision. Numerous types of leases may be granted under the present Mines and Minerals Act to cover various combinations of minerals. The present focus, however, will be upon the petroleum and natural gas leases currently in use. The terms of the granting clause have varied over the years, but, its tenor has remained fairly constant. The present clause reads:

> Therefore, in consideration of the rents and royalties payable, and subject to the terms and conditions expressed in this Lease, the Minister grants to the lessee the exclusive right to explore for, work, win and recover

petroleum and natural gas within and under the lands described in the attached Appendix, excepting from the lands described any petroleum or natural gas not granted under this Lease.

The lessee is entitled to hold this Lease for a term of five years; the term to commence on the date set out in the Appendix to this Lease and, subject to the Act, the lessees shall hold this Lease after the expiry date of the term for so long as this Lease is permitted to continue pursuant to the Act.

The lessee shall pay to the Minister

(a) in advance of each year of the term or the continuation of the term the annual rent of Two dollars and fifty cents ($2.50) in Canadian funds for each hectare in the location,

(b) a royalty on all petroleum and natural gas won, worked recovered or obtained from the location, and on all products obtained from petroleum and natural gas, at the rate or rates as are now or may from time to time be prescribed by the Lieutenant Governor in Council. The royalty to be free and clear of any deductions.

It may be argued that the grant is the only consideration offered by the Crown.[39] The apparent lack of Crown covenants has even prompted one writer to the rather extreme view that the present lease is not a contract which binds the Crown at all.[40]

The grantee receives rights over "petroleum and natural gas." It is an open question whether this includes other substances such as sulphur, helium, nitrogen, etc.[41] If one accepts the approach enunciated in Borys v. C.P.R.[42] then the common, not the scientific meaning of the substances prevails and the substances are classified in situ. Using these tests it is unlikely these other substances will be included in a grant of "petroleum and natural gas." First, a literal reading of the grant, focusing on the natural and ordinary sense of the words, does not compel the inclusion of these substances. Second, Crown grants are interpreted in favour of the Crown, despite the contra proferentem

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39. The previous Mines & Minerals Act R.S.A. 1970, c. 238 specifically stated, in s. 28, that the Crown did not warrant its title.

40. M. Crommelin, "Government Management of Oil and Gas in Alberta," supra n. 32 at 153.

41. In freehold lease the granting clause normally reads "oil, gas and related hydrocarbons." Some argue that this formulation is sufficient to grant such substances. See D. E. Lewis, "The Canadian Petroleum and Natural Gas Lease" (1952) Can. Bar Rev. 965 and J. Ballem, The Oil and Gas Lease in Canada (1973) at 88.

42. Supra n. 5.

rule.[43] Third, if the maxim expressio unius est exclusio alterius applies, it operates to exclude related substances.[44]

Certain rights are expressly excluded by other lease terms. The exemption clause refers to section 92(2) which reserves "oil sands" from ordinary petroleum and natural gas leases and licences. "Oil sands" is given a precise meaning by the Act.[45] The reservation contemplated by s. 92(2) only applies to Crown leases granted on or after July 1, 1978. Leases granted before the cut-off date carry the right to work the oil sands on the leased acreage and the Act does not alter this right. The government did not take back existing oil sands rights, it merely prevented their disposition, which would have ordinarily occurred under the standard petroleum and natural gas lease prevailing before 1976. Part 6 of the Act was introduced in 1978 to regulate subsequent oil sands development.

A second exclusion concerns rights to petroleum and natural gas found in certain geophysical formations. In 1976, the government inserted a "reservation of strata clause" into leases which

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43. Thompson v. Fraser Co. Ltd. [1930] S.C.R. 109, 3 D.L.R. 778.

44. This maxim, however, should be used cautiously. See B. G. McCombe, "Helium and Its Place in the Petroleum and Natural Gas Lease" (1962) 22 Alta. L. Rev. 9.

45. Mines & Minerals Act, s. 1(1)(9) and ss. 121 et seq.

provided that after a stated date the Crown could reclaim drilling rights below the lessee's deepest producing strata. Leases granted before the 1976 cut-off date do not contain this clause. The Mines and Minerals Act was amended by Bill 56, which received royal assent on June 2, 1981, and it introduced the equivalent to sections 103 and 103.01 of the current Act. These sections govern the actual reversion of drilling rights and provide that the non-producing stratas below the deepest producing strata will revert to the Crown at an appointed time.

The 1981 legislation may alter the rights of pre-1976 grantees whose leases do not contain the reservation of strata clause. Whereas the oil sands provisions were prospective only, the reversion of deep rights under Bill 56 applies to all leases, regardless of when they were granted. Thus, lessees who received their grants before the reservation clause was introduced in 1976, may be dispossessed by the operation of the 1981 amendment. However, post-1976 leases are not similarly affected as the new reservation in the leases effectively prevents the vesting of any rights to deep strata in the lessees.

(b) Duration of Leases

The Alberta government now favours interests with shorter primary terms as they encourage the timely turnover of interests. The present lease has a primary term of five years although the

initial term of some existing leases can still be as long as ten or twenty-one years.[46] These longer leases may result in one of two ways and both illustrate how the acquired rights of lessees were not violated when, in 1976, the government shortened the primary term of leases. First, leases granted before the 1976 amendments retain their initial primary terms. Thus, a lessee who entered into a twenty-one year lease in 1961 retains his rights despite the intervening amendments.[47] Second, holders of reservations or permits, granted before 1976, can exercise their unaltered right to proceed to lease and obtain a lease of the duration initially promised. Therefore, a permit holder who

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46. S. 98(1).

47. S. 90(e) and (f)

> (e) "ten-year lease means a lease of petroleum and natural gas rights granted
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> (i) during the period commencing June 1, 1962 and ending on June 30, 1976 or
>
> (ii) out of a reservation or permit of petroleum and natural gas rights issued during the period commencing June 1, 1962 and ending June 30, 1976,
>
> And having an initial term of ten years;
>
> (f) "21-year lease" or "21-year petroleum and natural gas lease" means a lease of petroleum and natural gas rights granted
>
> (i) under the former Act,
>
> (ii) out of a reservation of petroleum and natural gas rights issued before June 1, 1962.

fulfills the conditions of his permit has the right to a lease of the duration promised at the time the permit was granted.

In both cases lessees retained their rights to the original primary term, but they are subject to additional drilling requirements which have been subsequently imposed.[48] Although the

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48. Alta. Regs. 168/76 as amended 176/76, 247/79, 258/81, 318/81 provides in s. 2 that a lessee of a ten-year lease shall drill before a specified date. There is no set time for lessees under a 21 year lease, but they must drill within 1 year from the date they are notified by the Minister that drilling is required. This notice may be given as to any lease which has reached the tenth year of its primary term. The Minister may grant time extensions for the full ten years in the case of a ten year lease or for a maximum of four years in the case of a 21 year lease. Each hectacre to which the postponement applies is answerable for a penalty payment which is set by the Regulations and which increases yearly. It is within the Minister's discretion to grant the extensions but once granted the penalty payments are mandatory.

    The impetus behind these regulations is the desire to turn drillable land over more rapidly and to require drilling as early as possible, thereby guaranteeing optimal information recovery and production. The Minister possesses the general power to waive drilling requirements. Drilling will not be required where the land is subject to a unit operation or where an application to "group" locations has been granted by the Minister. Only acreage within the same designated area may be grouped. The effect is to allow drilling of one well to satisfy the obligation to commence drilling for all the lands so grouped. The maximum potential area which can be grouped is a function of both the location of the land and the projected depth of the well.

    Lessees under 21 year leases may similarly group their lands. The Minister may cancel any 21 year lease if drilling has not been commenced within a given extension. The regulations grant express powers of cancellation when:

government respected their acquired rights in one sense, it imposed new drilling obligations as long term interests were inconsistent with its new policy of shorter terms and faster turnover. The decision to retain existing rights was motivated by the desire to respect original agreements. However, the new policy of encouraging exploration and production would have been defeated if lessees could retain their lands, under their original leases, without engaging in either. The compromise adopted was to require drilling and exploration in exchange for the retention of the rights given under the previous tenure system.

(i) a time extension has been given under a 21 year lease but there has been no drilling within 1 year from the receipt of the Minister's notice. To fall within the statute the Minister would be forced to grant an extension before s. 4(3) could operate to cancel the lease.

Note, however, that s. 4(3) reads "on or before the expiration of the last extension period granted." This appears to empower cancellation in the following scenario:

May 1st - end of notice to drill given under s. 3(1)
May 2nd - 1 year extension granted under s. 4(1)
May 3rd - cancellation under s. 4(3).

(ii) s. 10(1) permits cancellation where the drilling requirement has not been satisfied by lessees under either twenty-one year lease or ten year leases. Note, however, that the Minister may only cancel the leases "as to that part of the location" where the failure occurred. Section 4(3) envisages cancellation of the lease itself.

The primary term of leases can be extended if the lessee qualifies for an extension under a subsection of s. 99 of the Act. Extensions are granted under subsection (a) if the location is within a spacing unit for a producing well, under subsection (b) if the location is subject to a unit operation and under subsection (c) if the location of the lease falls within a spacing unit where the obligation to drill an offset obligation has arisen. If the terms of (a), (b) or (c) are not met, the lessee must convince the Minister of the productive capacity of the leased land or he may lose part of his location. He would only be entitled to retain the lands then in production as his lease "location" may be reduced into a mere production "spacing unit".[49] Lessees must apply for extensions: they are not automatic, even if the requirements of the section are met.

Applications to extend a lease are made to the Minister regardless of the justification for its extension. Leases may also be continued where a potentially productive well is being drilled at the expiration of the primary term, if further

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49. A location is any tract of land described in an "agreement" and they include leases, licences, reservations, permits, etc. (sections 1(1)(a) and 1(1)(j) of the Mines and Minerals Act). They are potentially large tracts. By contrast, a spacing unit (s. 1(1)(v)) can be as small as one acre for a gas well and 1/4 acre for an oil well, or even smaller if the E.R.C.B.'s discretion is used.

conditions are met.[50] Even if the Minister is not convinced that the land in question is capable of commercial production he may nevertheless continue the lease and designate the parcel as an "unproved area."[51]

(c) Lands Which Can Be Leased

Another change introduced in the 1976 amendments was the abolition of the Crown reserve system. Previously, the holder of an exploration tenure had to choose the portion of explored lands he wanted to lease. Unchosen lands reverted to the Crown and became known as Crown reserves and were auctioned off. Any person, whether or not he was a licensee, was permitted to bid and obtain a lease on reserved lands. In theory, the Crown reserve system generated income and produced information concerning a parcel's productive capacity. Presently, licensees need not choose between lands as the amount of leasable land is a function of its location and the depth of the well drilled under the licence. The reason why the reserve system was abolished was succinctly stated by Mr. Getty:[52]

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50. S. 100.

51. S. 102.

52. Hansard, May 18, 1976 at 1391.

> Mr. Speaker, there was also a question regarding the new theory that you can earn 100 per cent of a drilling licence by drilling, whereas in past cases and some circumstances you could only earn 50 per cent. I guess the philosophy now is that the industry in Alberta has matured to the point that we want drilling, and for drilling we're prepared to have additional rights earned . . .

(d) The Lessee's Obligations

There is no drilling covenant in the current five year petroleum and natural gas lease so the failure to drill terminates the lease at the expiration of the primary term but is not a contractual breach. This resembles the position under the "unless-type" of freehold lease with the variation that Crown lessees must pay rental payments even when they are drilling.

The lessee is under an obligation to drill an offset well in certain situations but he is given the option between alternative modes of performance. He may either drill the offset well or pay the compensatory royalty set by regulation. The fixed offset royalty allows the lessee to determine whether it is more advantageous to drill the offset well or pay the royalty. The lessee is responsible for this managerial decision as the royalty level

permits speculation concerning the productivity of both the freehold and the offset well.[53]

There is an imbalance between the rights of lessees and their obligations. Lessees receive few "rights", other than the actual grant, because of the extensive discretionary powers of the Minister.[54] Most statutory provisions contain a residual

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53. Thus a lessee who believes that the offending freehold well, while presently producing, is not capable of producing in commercial quantities in the long term would elect to pay the initial penalties rather than incur the major cost of drilling what might turn out to be a short-lived well.

54. Lessee's rights include:

(i) s. 21 and 22 - right to work through other minerals

(ii) s. 94(3) right to have his fee and rental refunded if his application for a lease is refused

(iii) s. 97 delineates the rights granted and this must be read with the granting clause.

Lessee's obligations include:

(i) s. 29(1) information concerning royalty computation must be reported to the Minister

(ii) s. 38(1) due date and interest charges for royalty payments

(iii) s. 53(2)(a) obligation of indemnification

(iv) s. 54 information requirements

(v) s. 54.1 information must be kept in Alberta

(vi) s. 58 if required cash security must be paid

(vii) s. 94(1) obligation to pay yearly rentals

discretion or make a "right" contingent on the opinion or satisfaction of the Minister, either directly[55] or indirectly through definitional sections.[56] Most legal remedies available to a lessee require the existence of a legal right. Thus, mandamus will not issue, an action for breach of contract will not lie, nor can an expropriation result where no legally recognized "right" is involved. There are, however, more limited remedies which may permit the judicial review of administrative actions affecting the lessee. They will be discussed in Chapter Four.

While the various forms of ministerial discretion may prevent the vesting of a legally recognizable "right" that does not mean that the "quasi-rights" of lessees are worthless. Industry and government rely on the consistent application of discretionary

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(viii) s. 116 obligation to comply with production quotas

(ix) s. 117 that lessee must deliver to the Crown's royalty share the A.P.M.C. of petroleum and pentanes and must sell his share through A.P.M.C.

55. Examples can be found in s. 100(1) "drilling is being conducted diligently and continuously to the satisfaction of the Minister." Other sections are framed permissively - i.e., the Minister "may" - as 91, 92, 96, 103, 103.1. For a more detailed discussion of discretionary powers see Chapter III.

56. Note the definition of "producing well" in s. 90(d):

> "producing well" means a well that is, in the opinion of the Minister, capable of production of petroleum or natural gas in paying quantity.

powers to promote certainty. The government's administrative practice will often confer a value on these "quasi-rights" which lends a certain degree of security of tenure to interest holders, but the absence of a clear legal right means that the government remains free to act as it thinks proper. This is especially true in the case of the licensee's ability to proceed to lease, where it is generally recognized that licensees who have fulfilled the terms of their licences will be granted leases, although most people argue that they have no right to demand one. The same is true of lessees seeking to extend their leases under section 99(a). This section appears to give the right to an extension, but the requirement of a "producing well" introduces a discretionary element as the definition of that term depends upon the opinion of the Minister under s. 90(d). Thus, while lessees know the Minister's working definition there is not the same level of certainty as there would be if a right was clearly granted.

(e) Conclusion

The petroleum and natural gas lease grants the exclusive right to "explore for, work and win" provincially owned petroleum and natural gas. The substances granted and exceptions to the grant were reviewed. Lease terms were presented with emphasis upon certain obligations, the habendum provisions and the discretionary basis of "quasi-rights" flowing from the lease. The issue remains whether the lease is truly a "grant" in the sense that an interest in land is transferred, whether purely personal rights

are conveyed, or alternatively, whether a lease merely creates a statutory status in the lessee.

3. Statutory Status vs. Contractual or Proprietary Rights

In this section the legal nature of the interests granted under licences and leases is reviewed. In Alberta, the government controls petroleum and natural gas activities through contractual documents and regulations, so there are consensual and regulatory aspects to the same transaction.[57] This tends to blur the distinction between proprietary rights granted by the lease or licence documents and the regulatory limitations placed upon those rights. An example can be found in the production quotas imposed upon lessees by the Energy Resources Conservation Board: For the purposes of legal analysis, does one say that the lessee receives the contractual right to produce in unstated quantities, but this right is subject to ERCB regulatory limits; or is the better approach to say that the regulatory limitations modify the terms of the grant so that a lessee only receives the contractual right to produce in prescribed quantities?

In the following section I have chosen to focus on the nature of the interests granted in the contractual documents, apart from

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57. T. Daintith ed, The Legal Character of Petroleum Licences: A Comparative Study, 1981. "Petroleum Licences: A Comparative Introduction" 3.

limiting regulations because, theoretically, the grant is constant and binding whereas the regulations can be amended or abolished. In the first sections I ignore the effect of the compliance with laws clause on the terms of grant so that the initial question concerns the legal position of grantees, without reference to the compliance clause. The effects of this clause will be studied later in Chapter III and its consequences on the nature of the grant will be discussed then.

The first issue concerning the legal nature of licences and leases is whether these interests merely bestow a statutory status upon licensees and lessees, or whether their recipients possess "rights". In this area there are no concrete tests to determine whether rights or a status are granted. In his study of the legal character of petroleum licenses, Mr. Daintith suggests that an important factor is whether the Minister has the power to enter into contracts and on what terms and conditions. If he has this power and sets the terms and conditions then it is more likely that he is granting rights recognizable at common law.

This suggestion merely helps to bring the issue into focus but does not provide a sure test for differentiating between rights and a status. The test is difficult to apply because it is

rather vague and because the relevant factors in the Alberta legislation point in different directions.[58]

The first inconsistency deals with the power to set the terms and conditions of licences as the legislation mandates the most important licence rights and obligations but leaves other licence terms to the discretion of the Minister.[59] The Regulations dictate the extent of permissible exploration activities, the term of the licence, conditions of renewal, its initial cost, rental fees, the maximum area it can cover, grouping requirements and recourses for default. Paradoxically, the Minister is also given the express power to enter into licence agreements and set their form, terms, and conditions.[60] In light of the statutory limitations the extent of the Minister's powers are unclear but his discretion suggests more than a statutory status.

The same doubts and inconsistencies apply to leases. On the one hand, the Act sets out the lessee's rights and obligations in great detail, but on the other, it gives the Minister the discretion to grant or refuse leases and to set their terms and

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58. M. Crommelin, "The Legal Character of Petroleum Production Licences in Australia" in T. Dainith ed. supra n. 57 at 75.

59. Petroleum and Natural Gas Licence Regulations, Alta. Reg. 169/76 as amended by Alta. Reg. 248/79.

60. Id., s. 9.

conditions. Any doubts are compounded by the lease documents themselves as they incorporate the present and future terms of the Mines and Minerals Act. The argument that the Act and Regulations merely convey a statutory status has greater force for leases than licences because licences do not contain the compliance with laws provision. Lessees are therefore bound by statutory terms as they exist from time to time, so they may merely enjoy a statutory privilege. In that case the lease document would merely be the prerequisite necessary to enjoy the status of lessee and not the grant of legally recognized rights.

The classification of leases depends upon whether the form or the substance of compliance clauses prevails. In form, legislative amendments are incorporated into the lease as contractual terms, but in substance, they remain statutes and regulations governing the relationship between the Crown and its subjects. If form is emphasized then the rights and obligations of lessees are contractual but if substance prevails then it is easier to argue that the provisions of the Act merely create statutory rights and obligations.

The fact that the Crown uses standard form documents does not, of itself, point to either a grant of rights or the conveyance of a statutory status. The nature of the lease and licence forms suggests that the Crown is relying heavily on how rights and obligations are defined in the Act and Regulations, as the forms

are remarkably simple and short for documents which are intended to govern complex and ongoing relationships.

The wording of the documents resembles a grant of rights at common law. Individuals receiving rights are referred to as "licensees" and "lessees" and this connotes a grant of rights recognized at common law. The documents also speak in the terminology of grants, for example the lease begins with the phrase: "The Minister grants to the lessee".

It may also be important, for the purposes of establishing a grant, to note that obligations are undertaken by licensees and lessees. The presence of covenants indicates that the rights and duties may be more contractual than statutory. It has also been the operative assumption of both industry and government that licensees and lessees enjoy rights. While this assumption cannot determine the legal classification, it may tip the balance in favour of a "rights" classification.

The issue of whether licensees or lessees receive rights or a statutory status cannot be resolved with any certainty. The relevant factors include the powers conferred by statute, the nature and terms of the document and the expectation of the parties, but it is difficult to know what weight to give to each factor, especially when they point in different directions. I will proceed under the assumption that rights are granted as that

is the generally accepted belief and it is reasonable to construe the Alberta legislation as merely outlining the statutory framework in which rights can be granted and construing the licence document as the legal instrument which transfers rights in Crown resources.

4. Contractual vs. Proprietary Rights

These "rights" can be contractual or proprietary although there is a vesting in either case.[61] A distinction should be drawn between proprietary and contractual rights as they are treated differently for certain legal purposes . The nature of the interest granted will help determine a grantee's security of tenure and this will affect the availability and terms of financing. In Alberta, the compensation provisions of the Expropriation Act only apply where an interest in land has been taken and even if the expropriatory statute allows compensation for personal rights, the level and basis of compensation may vary according to whether the rights are classified as contractual or proprietary.

(a) Licences

The salient factors for differentiating between contractual and proprietary rights include the substance of the transaction, the wording of the document and the quality of the right, rather

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61. R. Harrison, supra n. 60 at 89.

than its duration.[62] At common law a "licence" is generally regarded as conferring merely personal rights[63] but the label given to the interest should not determine its classification. The wording of the document suggests a conveyance and the exclusive right to drill and produce resembles a licence coupled with a proprietary interest. While similar rights can be granted contractually, the tenor of the document gives it the appearance of a transfer of an interest in land.

The right to proceed to lease has sometimes been characterized as an option to acquire a lease. Since a lease is an interest in land it is argued that the right to acquire the lease under an option is also an interest in land.[64] While this may be true under some legislation,[65] it is submitted that a similar interpretation of the Alberta legislation may not be possible due to section 13 of the Regulations and section 93 of the Act. It is

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62. M. Crommelin, supra n. 60 at 89.

63. R.E. McGarry and H.W.R. Wade, The Law of Real Property (4th ed., 1975) 776-786.

64. R. Harrison, supra n. 10 at 503.

65. Canadian Oil and Gas Land Regulations, S.O.R./61-253 as am section 35(1) made under the Territorial Lands Act, R.S.C., 1970, C.T-6 and Public Land Grants Act, R.S.C., 1970, C.P.-29.

    Permits and reservations under the old system gave the right to a lease. Exploration permits under the Canada Oil and Gas Act grant the exclusive right to proceed to lease.

essential to an option that the optionor be obligated to the optionee, because once the option is exercised the holder can require it performance. The licensee's apparent inability to demand a lease demonstrates the weakness of this analogy in the present case.

The effect of section 13 is best appreciated when one contrasts licences in Alberta with exploration agreements which grant the definite and unqualified right to proceed to lease. If there is no ministerial discretion to refuse the lease then the government is obliged to grant a lease when the stated requirements are met. If the government wrongfully refused, a licensee could base his remedies on administrative law and contract law principles. Under administrative law principles mandamus may lie to compel the Minister to grant the lease if this was his statutory duty. He may also argue that the entitlement to a lease was a term of the licence and that a failure to grant a lease constituted a contractual breach.

If Alberta licences were the same as this type of exploration agreement, licensees would either be entitled to a lease or to damages but entitlement under the current regulatory scheme is questionable. Firstly, s. 13 of the Regulations merely states that a licensee can apply for a lease and secondly, under s. 93 of the Act, the Minister may review a licensee's application for a lease. The government's control over who will receive a lease

prevents the licensee from having a proprietary interest resembling an option. The right to explore, drill and produce does, however, suggest that licensees enjoy a proprietary interest in the nature of a profit a prendre rather than mere contractual rights to perform those activities.

(b) Leases

The strongest argument that an interest in land is created by a Crown petroleum and natural gas lease is based upon an analogy with the standard "unless" type freehold lease. The Supreme Court decided that this type of lease granted an interest in land, in the nature of a profit a prendre, in the decision of Berkheiser v. Berkheiser.[66] The other available characterizations in Berkheiser included an irrevocable licence, a licence coupled with a grant, a veritable lease, or an outright sale.

In the Berkheiser case the terms of grant read:

> "The Lessor doth hereby grant and lease all the petroleum and natural gas within upon or under the lands."

Mr. Justice Rand, speaking for the majority, warned that the intention of the parties to the instrument should govern its

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66. Supra n. 5 at 390 et seq.

classification.[67] Subsequent decisions have, however, generally characterized a petroleum and natural gas lease as creating a profit a prendre, without construing the document itself. The suggestion of Mr. Justice Rand that each lease be interpreted individually and according to its own terms seems to have been replaced by a judicial tendency to classify all petroleum and natural gas leases according to the result in Berkheiser rather than its principles.

Crommelin argues that the current Crown lease form does not convey an interest in land because it only grants the right to "explore for, win, work and recover the substances." In his view, this phraseology does nothing more than grant personal rights to perform these activities, without conveying an interest in land. He reaches this conclusion by comparing the wording of the lease in the Berkheiser case with the present Crown lease. He believes that an interest in land was granted in Berkheiser as the document was framed in terms of an in situ grant. He argues that the absence of similar wording in the present Crown lease prevents it from transferring proprietary rights. His view is that only certain activities are authorized under the Crown lease and that they do not amount to an interest in land.

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67. Id., at 392.

Crommelin's emphasis on the wording of the instruments is to be recommended as a return to basic principles and to the methodology of Mr. Justice Rand. It is quite clear that a grant and lease "of all the petroleum and natural gas within, upon or under the lands" in Berkheiser is stronger than the Minister's grant of the exclusive right to "explore for, work, win and recover petroleum and natural gas within and under the lands." That alone does not, however, compel a finding that the authorized activities do not amount to proprietary rights.

There are many reasons why Crown leases should be seen as interests in land. First, the lease uses the terms "grant" and "within and under the lands" and they suggest a proprietary grant as in Berkheiser. Second, a grant of the rights in situ may be inferred from the right to win, work and recover the substances. As in the case of a profit a prendre the lessee becomes the owner of the petroleum and/or natural gas upon their severance from the soil. Arguably, authorizing activities which result in ownership also entails some form of grant. Third, a comparison between bare licences and the present lease form illustrates that merely personal rights are generally couched in different and less extensive terms. Fourth, the reservation of a "royalty" suggests that the Crown is carving out part of the interest in land which will not pass to the lessee. Fifth, prevailing opinion shared by industry and government is that an interest in land is created. This consideration would not prevent a court from following

Professor Crommelin's analysis if it proved to be correct in principle but the parties' intention is extremely important in matters of construction. The desire of both parties to establish an interest in land, with the attendant security of tenure, should not be easily ignored.

It is my conclusion that an interest in land, similar to a profit a prendre, is granted under the current lease form, even though section 97 suggests a complete divestiture of Crown rights. It reads: "A petroleum and natural gas lease grants the right to the petroleum and natural gas that are the property of the Crown in the location subject to any exceptions expressed in the lease." It is unlikely that this section results in the sale of Crown resources for numerous reasons.

First, while section 97 becomes a term of the contract through the compliance provision, it is probable that the specificity of the granting clause would prevail in a contest between it and section 97. Thus, only the right to "explore for, win, work and recover," is transferred. Second, sections 97 and 16 appear to conflict as section 16 states that: "No mineral belonging to the Crown in right of Alberta shall be sold unless the sale is specifically authorized under an Act of the Legislature." If section 97 operated to effect a sale two results are possible: either the sale is void unless the mandatory terms of section 16 are followed, or section 16 envisages that section 97, a provision

of the Mines and Minerals Act itself, is sufficient statutory authorization for a sale. This latter result is unlikely as section 16 appears to require a separate authorization, outside of the general provisions of the Mines and Mineral Act. It is also improbable that the Crown intends absolute alienation due to the importance and value of the rights involved.[68]

Lastly, a general policy argument may help lessees to establish the proprietary nature of their interests. The recognized conflict in any resource management system is between the lessor's desire to maintain flexibility and the lessee's need for security of tenure. A finding that the lease creates an interest in land satisfies the lessee's requirement of security, but the government remains free to alter the rights that it grants whether they are proprietary or contractual. Under either classification the Crown retains the freedom to vary the terms of its lease, thereby satisfying its basic goals of flexibility. A finding that leases grant an interest in land would therefore benefit the lessee but not at the expense of one of the Crown's managerial goals.

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68. A. Gervais, supra n. 6 at 27. Other reasons suggested for an alternative interpretation include:

(a) the significance of ownership issues in the constitution debate concerning jurisdiction over resources;
(b) the fact that section 97 does not appear in pre-1962 legislation, and
(c) the caselaw on the nature of the interest created by a freehold lease.

F. Conclusion

Both licences and lessees transfer rights, and after reviewing the relevant variables, it is suggested that each conveys an interest in land in the nature of a profit a prendre. The initially proprietary nature of these rights promotes security of tenure but the true position of grantees depends upon the effect of the compliance with laws provision on leases, the effect of other contractual terms authorizing unilateral variation by the Crown, the discretionary powers retained by the Minister, the possibility of midstream variations, the likelihood of confiscatory legislative enactments and whether they are done with or without compensation. Each of these factors will be discussed in the following chapters.

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CHAPTER III

CONTRACTUAL PROVISIONS

Introduction

Chapter II presented a general overview of Alberta's current tenure system and regulatory regime. In this Chapter I take a closer look at how the government retains flexibility by the contractual provisions it inserts in leases and licences. Due to the tenure and regulatory system in Alberta there is an overlap between the contractual aspects of resource agreements and their statutory underpinnings. In this sense I have used "contractual" to mean the terms and conditions found in the granting documents.

Most of the discussion concerns the "compliance with laws" provision which allows midstream contractual variations. This clause allows the Crown to unilaterally vary lease provisions as a matter of contract between itself and its grantees. No issue of expropriation or compensation for acquired rights arises as the Crown is merely exercising an express contractual right to vary the terms of the lease. The legal effect and application of this clause is studied and the arguments advanced to limit its scope are presented, with appropriate references to the production cutbacks and the deep rights reversion provisions.

A second contractual provision permits unilateral variation but it is limited to the royalty rate exacted by the Crown. The

special protection given to this clause is examined in light of the government's desire to obtain as much of the available economic rents as possible and the grantee's need to judge the commercial viability and profitability of his find. The current powers to alter the royalty rate are delineated and a brief overview of the history of the variable royalty rate is given.

A. The Compliance with Laws Provision

In Alberta this type of provision is only inserted into Crown petroleum and natural leases, but not into licences. In contrast, a compliance clause can be found at both the exploratory and production phases of British Columbia's two tier tenure systems for petroleum, natural gas and coal. The current Alberta lease provision reads:

> The Lessee and the Minister agree with each other as follows:
>
> 1. The lessee shall comply with the provisions of The Mines and Minerals Act, as amended, and any Act passed in substitution therefor, and with any regulations now made or that at any time may be made under the authority of the said Acts, and all the provisions and regulations that prescribe, relate to or affect the rights and obligations of lessees of petroleum and natural gas rights that are the property of the Crown in right of

> Alberta. The provisions of any other Act of the Province of Alberta that prescribes, relates to or affects the lessees of the said petroleum and natural gas rights, shall be deemed to be incorporated into this Lease and shall bind the lessee from the date it comes into force. In the event of conflict between any regulation made after the execution of this Lease and any regulation previously made, the regulation last made shall prevail.

This clause authorizes the unlimited and unilateral variation of any and all lease terms. The Crown may amend the Mines and Minerals Act in its legislative capacity but the amendments become contractual terms vis a vis lessees because the compliance clause incorporates them, by reference, into the contract. The clause has two primary effects: lessees are aware that their rights are subject to variation by the Crown and secondly, lessees are deemed to consent to subsequent alterations so they cannot claim that their rights have been expropriated if the alteration reduces their rights.

The breadth of this power undermines a lessee's legal security of tenure and it is often difficult to explain why a lessee would invest heavily on the basis of the current lease

document.[69] The explanation most often suggested centers on the good working relationship between the Government of Alberta and its lessees: Alberta possesses proven resources and the government has not abused its variation powers in the past so lessees are willing to chance midstream variations.[70] This is a somewhat surprising phenomenon as legislative and contractual changes are not "risks" in the same way as geological or financial vagaries. In the economics field the concept of "risk" concerns factors which a party recognizes as variable.[71] Midstream legislative variations are not risks in this sense because they more closely resemble "uncertainties". Uncertainty can be defined as unexpected and unpredictable changes affecting profitability. Investors recognize and assume responsibility for financial risks but uncertainty traditionally reduces investor confidence. The compliance clause firmly establishes the Crown's variation powers, warns lessees that the government will not compensate for the effects of deleterious variations, and its presence may change the

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69. A.R. Thompson, "Legal Characteristics of Dispositions: An Overview", paper presented at a conference on the Public Disposition of Natural Resources, Banff Center, April 12-15, 1983.

70. A.R. Thompson, supra n. 10 and 311; R. Harrison, supra n. 10 at 508.

71. A.R. Tussing and Greg K. Erickson, Mining and Public Policy in Alaska, Institute of Social, Economic and Government Research, University of Alaska, Fairbanks, 1969 at 34.

nature of midstream variations from unpredictable uncertainties to accepted investor risks.

Whether or not midstream variations should be classified as risks or uncertainties, it is quite clear that the extent of the variation power has prompted a search, by courts and commentators, to find ways to narrow its scope. The first limitation requires that the Crown must reserve the power to vary the contract in clear and unequivocal terms. This point is founded upon, and well illustrated by the trilogy of Transfer Agreement cases. A second limitation may be founded upon the contract and property law principle that the terms of a contract or grant must be certain. Further attempts to limit the effects of the compliance with laws provisions focus on the relationship between this provision and other lease terms, and the unequal bargaining relationship between the Crown and its lessees. These two factors form the basis of the fourth argument which draws the distinction between regulatory and expropriatory powers and attempts to limit the operation of the compliance clause to exercises of the former.

1. The Power to Vary a Contract Unilaterally Must Be Specifically Retained

The Transfer Agreement cases establish what degree of specificity is required before one contracting party can retain and exercise the power to unilaterally vary a contract. As explained in Chapter II, section 2 of the Natural Resources Transfer

Agreement[72] prohibits legislative modifications to agreements concluded before the transfer. In the following cases the provincial government enacted modifying legislation but argued that the changes should bind lessees because the federal government reserved the contractual right to vary the leases. As the Transfer Agreement effected a statutory novation, the Alberta government was claiming whatever variation rights existed as a successor in title. The issue in these cases was whether the initial federal agreements were properly worded to reserve the contractual right to incorporate future regulatory and statutory changes.

The first case which raised these issues was Spooner Oils Ltd. v. Turner Valley Gas Conservation Board.[73] The facts are somewhat complicated: Spooner was granted a petroleum and natural gas lease by the federal government in accordance with the 1910 and 1911 regulations. A copy of the regulations was attached to the lease with an express declaration that the lease was granted subject to them. Section 1 of the regulations reads:

> "The term of the lease shall be twenty-one years, renewable for a further term of twenty-one years, provided the lessee can furnish evidence satisfactory to the Minister to show

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72. Supra, p. 7.

73. Supra n.12.

> that during the term he has complied fully with the conditions of such lease and with the provisions of the Regulations in force from time to time during the currency of the lease."

Renewal was premised on compliance with intervening regulations. In 1928, federal regulations provided, in section 29, for conservation obligations enforceable by the Minister under sanction of cancellation. The Spooner Oils case dealt specifically with whether the conservation scheme imposed by Alberta's Turner Valley Gas Conservation Act violated section 2 of the Natural Resources Transfer Agreement Act.[74] The decision recognized the dual capacity of the Crown in contractual arrangements but it focused on the Crown's contractual capacity. The court held that the language of the federal agreement did not reserve the contractual right to unilaterally vary the contract and that the proposed variations could not operate generally as legislation in light of the prohibition in section 2 of the Transfer Agreement Act.

The court did not attach any special importance to the fact that one of the contracting parties was the Crown, but decided the issues in accordance with general principles of contract law. The clause in this case provided that the lessee would be bound by

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74. R. Harrison, supra n. 10 at 490.

"the regulations in force from time to time." The provincial government argued that this clause extended to regulations which existed at the time of the grant, regulations incorporated into the lease at the time of the grant and all regulations subsequently enacted. The Court, construing the document as a whole, held that the proposed interpretation was too wide. It limited the clause's effect to changes caused under the 1910 or 1911 regulations or under the lease itself, but not to all regulations subsequently enacted.

Professor Harrison considers that this decision can be supported for two reasons.[75] First, the lease premised renewals on compliance with the terms of the lease and "with the regulations under which it is granted." The compliance with laws provision also referred to the "said regulations" but the key words "from time to time" were absent in both instances. Second, certain provisions under the 1910 and 1911 regulations expressly envisaged future variations from "time to time." This specificity did not support the contention of a broader right in relation to all subsequent regulations.[76]

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75. R. Harrison, surpa n. 10 at 490.

76. Id., at 491.

The Spooner Oils case illustrates the court's exacting approach when one contracting party attempts to retain powers authorizing unilateral variation. The reasons for the decision suggest that any document purporting to retain the right to incorporate future changes must be carefully drafted with an eye towards completeness and consistency.

The second in the trilogy of Transfer Agreement cases is A.G. for Alberta v. Majestic Mines Ltd.[77] The lease provided: "yielding and paying unto Us and Our Successors, the royalty, if any prescribed by the regulations of our Governor in Council."[78] When the parties entered into the contract there was no royalty on petroleum, but there was a royalty on coal. The Crown subsequently sought to introduce a royalty on petroleum and the lessees argued that this was contrary to the Transfer Agreement Act. The Crown in right of the province countered that the contractual right to vary the contract was retained by the federal government. It argued that this clause, on its true construction, contemplated future petroleum royalties because that was the only way to give meaning to the words "if any". The Supreme Court rejected this argument and held that a party who wants to reserve the power to

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77. [1942] S.C.R. 402.

78. Id., at 404.

incorporate future provisions must do so expressly and not as a matter of implication or construction.[79]

The last case is A.G. Alberta v. Huggard Assets[80] where the lease contained the following royalty clause: "yielding and paying unto us and our successors such royalty upon the said petroleum and natural gas, if any, from time to time prescribed by regulations." The facts were comparable to those in Majestic Mines as no royalty was stipulated at the time the contract was entered into. The facts in Huggard Assets differ slightly from those in Spooner Oils. In Huggard the words "from time to time" appear in the lease document, whereas in Spooner they appear only in the 1910 and 1911 regulations. While it may be tempting to use this factual difference to distinguish the cases it is impossible to do so because the regulations in Spooner Oils were incorporated into the lease and this made them contractual terms as well. The relevant clauses are contractual in both cases even though they have different origins. Spooner Oils can, however, be distinguished because the clause in that case was insufficient to allow future changes because of the other contractual provisions, and not because the clause was inherently deficient.

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79. Id., at 405.

80. [1953] A.C. 420.

In Huggard Assets the court upheld the variable royalty provision because the desired level of specificity had been achieved. Lord Asquith of Bishopstone stated:[81]

> "The first question which their Lordships have to decide is whether in these circumstances, having regard to the terms of the grant, and in particular to the words "from time to time" the reddendum purported to entitle the Crown, as grantor - then in right of the Dominion - to levy royalties "prescribed" by a regulation, or a succession of regulations made after the date of the grant. Their Lordships have considered these questions and are clearly of the opinion that the answer must be in the affirmative. The grant does purport to confer such a right on the grantor. This was the unanimous opinion of the Supreme Court of Canada. Any other answer would render the words "from time to time" meaningless. If it is true that in Majestic Mines Ltd. v. Attorney General of Alberta, a different conclusion was reached, but the crucial words "from time to time" were absent, and clearly the decision might have been the other way if they had been present."

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81. Id., at 436.

These "crucial words" can be found in the current compliance with laws provision and royalty provisions in leases. Under the test established by the Transfer Agreement cases the Crown has properly reserved the contractual power to unilaterally vary lease provisions.

It is interesting to note that these crucial words are not inserted into licensees. Licences are presently granted in the following terms:

> In consideration of and subject to the terms and conditions herein contained, a LICENCE is hereby granted to the Petroleum and Natural Gas Rights, the property of the Crown in right of Alberta, its heirs, executors, administrators, successors and assigns in accordance with the Petroleum and Natural Gas Licence Regulations in the lands described in the SCHEDULE hereto.
>
> This licence is subject to:
>
> (i) the Petroleum and Natural Gas Licence Regulations,
>
> (ii) The condition that natural gas produced from the lands herein described shall be used within the Province of Alberta, unless the consent of the Lieutenant Governor in Council to its use elsewhere has been previously obtained.

EXECUTED on behalf of the Minister of Energy and Natural Resources at the City of Edmonton, in the Province of Alberta, as of the day of , 19 .

_____

for Minister of Energy and Natural Resources

No contractual power to vary the licence is reserved, nor does it flow from section 18 of the Petroleum and Natural Gas Licence Regulations which states:[82]

> "In the event of failure to comply with any of the terms or conditions of the licence, or of the Mines and Minerals Act or any regulations thereunder, the Minister shall notify the licensee in writing indicating that the licence may be cancelled unless within 30 days after the date of the notice the licensee remedies the default to the satisfaction of the Minister."

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82. Mines and Mineral, Alta, Regs. 169/76 as am. 248/79 242. Note that s. 47 of the Act does not cure this situation because it only covers references in agreements and not references in either the Act or the Regulations:

> 47. A reference in an agreement to an Act of Alberta shall be deemed to be a reference to the Act as amended fromt time to time.

This section does not contemplate "terms or conditions", "The Mines and Minerals Act" or "the regulations thereunder" as modified from "time to time" so licensees will be bound only by the terms and conditions of their grants and the terms and conditions of the Act and Regulations which existed at the time of their grants. The only way the Crown could change those terms and conditions would be to enact retroactive legislation. (The issues associated with retroactive enactments will be discussed in Chapter V).

The compliance clause is a powerful means of retaining Crown flexibility and one may ask why it is not also inserted into petroleum and natural gas licences. The most probable answer is that licence agreements do not require the level of freedom given by the compliance clause or that the Crown has retained the required flexibility in a different way. Licences are inferior interests, which are granted for a limited and definite term; both their renewal and their upgrading into leases are matters within the discretion of the Minister. These factors reduce the need to impose midstream variations because the government can usually wait until the primary term has expired and introduce new provisions as conditions of renewal or as lease terms.

2. The Common Law Requirement of Certainty

The first limitation on the operation and scope of the compliance with laws provision comes from the case law requirement that the right to unilaterally vary the contract must be clearly and expressly reserved. Even when this requirement is met, the terms of the contract must still be certain, or capable of being made certain before the contract will be valid at common law. This is the source of the second possible limitation on this powerful clause. The compliance clause authorizes the unilateral variation of contractual terms from time to time but there is no express or implied limit upon the number of times the contract can be altered, nor is there, subject to the third possible limitation, any express restriction on which terms can be altered. This potentially unlimited variability may make petroleum and natural gas leases uncertain at common law.

An initial issue arises concerning the appropriate test of certainty when the Crown varies agreements pursuant to a compliance with laws provision. There are two ways to frame the issue. The first is by asking whether a lease is sufficiently certain if its terms are set from time to time, by one of the contracting parties. The second isolates the different capacities of the Crown and asks whether a lease is sufficiently certain if its terms are set, from time to time, by a third party. The first is more realistic and it is supported by both the theoretical

indivisibility of the Crown and the substance of the incorporation by reference.

The certainty of Crown grants has been canvassed largely in relation to variable royalties. In A.G. Alberta v. Huggard Assets[83] the Court assumed that an analogy between royalty and rent was appropriate and stated: "A fluctuating rent is not necessarily uncertain - certainly not if it is mathematically calculable, so as to attract the operation of the maxim certum est quod certum reddi potest". The court did not find that the setting of the rate by the grantor was fatal, so the variable royalty provision is insulated from an attack based on common law uncertainty.

As Huggard Assets merely dealt with one term of the contract, it may not validate a contract where all terms are subject to unilateral variation from time to time. Even if the power to vary given by the compliance clause cannot be supported by this decision, the general law test of certainty merely requires reasonable specificity, or terms reasonably ascertainable by application of an agreed formula, method or principle of determination. The issue is then whether the discretion of the Minister, the regulations set by the Lieutenant Governor in Council and the

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83. Supra n. 80.

statutory provisions of the Mines and Minerals Act constitute an agreed formula. The answer appears to be in the affirmative and the Crown could also rely on principles of freedom of contract to uphold the certainty and validity of the compliance with laws provision. Even if the compliance clause made the contract uncertain, it is not clear whether only the clause itself would fall or whether the entire agreement would be invalidated.[84] In conclusion, the decision in Huggard Assets and the lenient common law principles of certainty will probably prevent a successful attack upon the compliance clause, or agreements subject to it, on the grounds of uncertainty.

Further attempts to limit the scope of the compliance clause emphasize the relationship between this provision and other lease terms and stress the unequal bargaining relationship between the

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84. If only the compliance clause falls as uncertain, variations allegedly affected under it could not operate as contractual terms. This argument benefits interest holders as it recognizes the continued existence of the original terms of the agreement and merely severs the offending clause.

    An alternative argument suggests the complete invalidity of the agreement by reading the original terms subject to the overriding right to vary. It could either cover initial uncertainty or one could argue that uncertainty arises only upon the exercise of the right to vary. In either case the clause strikes at the root of the contract and cannot be severed from it. If no contract exists the companies lose their interests. The only benefit from such a course, given the right to surrender leases and licences, is a possible quasi-contractual claim based on the beneift received by the Crown from the actions of the companies.

Crown and its lessees. These suggestions try to limit the scope of variations which fall within the compliance clause so that certain variations will only operate as legislative enactments, with the possibility of compensation for expropriated rights.

3. Other Limitations on the Use of the Compliance Clause

Dr. Andrew Thompson contends that because the compliance provision is a contractual undertaking it only authorizes variations to contractual terms. He draws a distinction between contractual undertakings and matters which affect the grant and argues that the latter are beyond the scope of the compliance clause.[85] The term of the lease, the royalty provisions, the grant, the habendum and reddendum provisions are somehow "entrenched" because the compliance clause does not include variations of these provisions. This argument finds some support in the wording of the clause: to speak of it as a compliance with "laws" provision suggests that a distinction should be drawn between the terms of the grant and the "laws" which are external to it. But the compliance clause does not differentiate between statutory provisions which affect the terms of grant and those which do not. All such terms are incorporated and arguably the power to vary extends to both. The rules of construction requiring a document to be read as a whole and providing that Crown

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85. A. R. Thompson, supra n. 10 at 311.

grants are to be construed in favour of the Crown, would also limit the usefulness of this argument.

Dr. Thompson also builds upon an analogy to the legal treatment of exemption clauses where there has been a fundamental breach of contract. He argues that certain provisions are so basic to the nature of the undertaking that any subsequent alteration is illegal. Suggested terms include the term of the lease, the rental and royalty clauses and the basic right to produce and market. This argument seeks to invalidate changes which attempt to infringe upon an essential term of the lease. Thompson himself caveats:[86]

> " . . . an underlying assumption has been that the inequality of bargaining power in favour of the party proffering the form justifies a departure from the traditional concept of the binding force of all the terms of a written contract. This appeal to the protective sentiments of the court would have a hollow ring when made on behalf of oil companies which have been accepting Crown leases for many years full cognizant of the "fine print".

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86. Supra, n. 10 at 313.

While this is true to a large extent, there remains a gross imbalance of bargaining strength between the parties. The Crown's superior position can be traced to its stewardship of provincially owned resources and its power to invoke a sovereign legislative capacity to retroactively alter the terms of its agreements. Grantees may also benefit from a court's natural reluctance to construe an agreement so that one party can in effect destroy all the consideration it has purported to give.

4. Constitutional Limitations and The Compliance Clause

Under the compliance with laws provision statutory enactments become contractual terms, highlighting the dual capacity of the Crown when it grants resource rights. The operation of this clause raises the interesting constitutional question of whether the Crown can impose contractual provisions which it could not enact. In other words, can the Crown, in its contractual capacity as owner of provincial resources, effect results which are ultra vires under the constitutional delimitation of legislative powers? This question was more important before the Canada Act, 1982 extended provincial legislative authority over non-renewable resources because those constitutional changes now expressly extend provincial legislative power to cover some of Alberta's controversial legislation which some previously thought was ultra vires. Alberta's questionable legislation included the petroleum production cutbacks and the condition that the Crown's royalty share and the lessee's share of petroleum and pentane plus must be

delivered and sold through the Alberta Petroleum Marketing Commission.[87]

The increase in legislative authority under the Canada Act, 1982 does not, however, solve the issue of the role and relevancy of constitutional limitations when the Crown contracts as owner. The province may still attempt to insert contractual provisions which would be beyond its extended legislated competence. Some argue that the Crown may contract subject only to the same limitations imposed on all individuals; namely compliance with the common law, provincial statutes and validly enacted federal legislation. As owner, the Crown enjoys the attendant rights of use, enjoyment and alienation. It need not, the argument runs, rely on section 92 of the B.N.A. Act to support the uses it makes of its property. The decisions in Smylie v. The Queen[88] and Brooks-Bidlake[89] are cited as authority for the principle that

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87. M. Crommelin, supra n. 32 at 96 posits that constitutional limitations do not apply. Contra G.A. Holland "The Federal Case" (1963) 3 Alta. L. Rev. 393. It is argued that the A.P.M.C. is, in pith and substance, a price setting device. See D.E. Thring "Alberta, Oil and the Constitution" (1979) 17 Alta. L. Rev. 69.

88. (1900) 27 O.A.R. 172 at 192 per Moss J.A.: The province has authority to attach to the contract a condition not impossible of performance or unlawful or prohibited by an existing law.

89. Brook Bidlake and Whittal Ltd. v. A.G.B.C. [1923] A.C. 450 suggests that the limit to s. 92(5) is not the scope of the federal power but the actual occupation of the field by

the Crown can impose contractual provisions even if it does not have the power to enact such provisions in legislation. This technique of legislating by contract allegedly permits the province to achieve indirectly what it cannot do directly.

The alternative view stresses that the Crown can only impose contractual conditions that also fall within its legislative competence. If one relies on the principle that one cannot do indirectly what cannot be done directly, the result is a de facto piercing of the Crowns dual capacities. Under either view, validly enacted federal legislation binds the Crown in right of the province but the arguments differ when there is no federal

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existing federal legislation.

Previously, terms were expressed as determinable limitations affecting the lessee's estate. If the term and method were ever challenged and held to be ultra vires the limitation would itself be void. The effect of a void limitation is the invalidity of the entire grant. Therefore, lessees had no interest in questioning government measures as a successful challenge would only result in the invalidity of their interests. Now provisions are couched in terms of "conditions". A breach would therefore require an exercise of the right of re-entry or an election to disaffirm, but more importantly, if constitutionally or otherwise invalid only the condition falls; and the grant become absolute. Therefore a court challenge would not be without reward in an meritorious case.

See A.R. Thompson, supra n. 69 at 20 et seq. He argues that the province can contract beyond its legislative powers and questions whether contractual provisions can be reviewed for constitutional validity. He argues that only legislation can be so questioned.

legislation on the subject. Under the first argument the province is free to insert any type of contractual provision it desires, in the same way as any owner. If there is no federal legislation prohibiting the insertion of a particular contractual term then the province may insert that term. Under the second argument, provincial and federal powers are defined by the constitutional division of legislative powers and not by whether or not the federal government has occupied the field by enacting legislation. In this way, contractual actions taken by the province as proprietor must also be supported by jurisdiction under an enumerated head.

There are many reasons why the second argument should be preferred. First, it does not allow the fiction of dual capacities to increase the powers enjoyed by the Crown. Second, it reflects the constitutional principle that provincial power is not augmented merely because Parliament has not occupied the field by enacting legislation. Third, because the Minister receives his power through the delegation of the Mines and Minerals Act he cannot exercise powers which are beyond the legislative scope of the Act.[90] This might be a less weighty argument in light of the recognition of the Crown's inherent right to contract in Verrault.[91] There is an argument that this practice of "leg-

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90. G.A. Holland, supra n. 87 at 415.

91. Supra, n. 16.

islating by contract" can be supported under the Crown's prerogative power,[92] but some argue that the Crowns Lands Act[93] legislation received and unrepealed in Alberta, limits Crown prerogative rights.[94] If this legislation abrogates the prerogative then those special powers cannot be invoked unless they are

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92. A.R. Thompson, "Sovereignty and Natural Resources" (1969) 4 U.B.C.L.R. 161 at 171 footnote 42. He argues that in light of comments made by Lord Asquith of Bishipstone in A.G. Alberta v. Huggard Assets the Act was not meant to apply in the colonies.

93. 1702 Imp. c. 7.

94. G.A. Holland supra n. 87 at 405. See: A.G. v. De Keyser Royal Hotel (1920) A.C. 508 where the Courts so held. Lord Atkinson at 539:

> "It is quite obvious that it would be useless and meaningless for the Legislature to impose restrictions and limitations upon, and to attach conditions to, the exercise by the Crown of the powers conferred by a statute, if the Crown were free at its pleasure to disregard these provisions, and by virtue of its prerogative do the very thing the statutes empowered it to do. One cannot in the construction of a statute attribute to the Legislature (in the absence of compelling words) an intention so absurd. It was suggested that when a statute is passed empowering the Crown to do a certain thing which it might theretofore have done by virtue of its prerogative, the prerogative is merged in the statute. I confess I do not think the word "merged" is happily chosen. I should prefer to say that when such a statute, expressing the will and intention of the King and of the three estates of the realm, is passed, it abridges the Royal Prerogative while it is in force to this extent: that the Crown can only do the particular thing under and in accordance with the statutory provisions, and that its prerogative power to do that thing is in abeyance."

expressly revived, and they have not yet been so revived. There is, however, the argument that even prerogative powers must be exercised within the province's proper legislative sphere. Therefore, whether the government acts under a statute, its prerogative or its inherent contractual capacity its power is still limited by its legislative competence.

In conclusion, when the Crown relies on legislated amendments as contractual terms it is my opinion that their constitutional legitimacy should be open to question. Although there are cases and comments to the contrary, I believe that as a matter of first principle the provinces should not be permitted to do something indirectly if they could not do it directly. There is no doubt that the Crown can impose contractual terms and conditions,[95] but the courts should be able to go behind contractual terms to test for constitutional validity. Thus, one can tentatively conclude that the province should not be able to impose contractual terms it could not legislate, even in an unoccupied field.

B. The Royalty Provision

The Crown reserves a production based royalty on all provincially owned petroleum and natural gas. The Crown earns revenue

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95. In Re Timber Reg: A.G. Man et al. v. A.G. Can., [1935] 1 W.W.R. 607.

from petroleum and natural gas through the cash bonus bidding system, yearly rental payments and its taxing powers, but most revenue comes from the royalties it collects as owner. As the steward of publically owned resources, the Crown tries to maximize its share of the economic rents generated from petroleum and natural gas extraction and to prevent industry from collecting any "windfall profits" which may result from an increased market price. The Crown has therefore imposed a variable royalty rate in an attempt to accommodate market fluctuations.

1. The History of Variable Royalties

The Alberta government did not always impose a variable royalty. After the Transfer Agreement Act, 1930, the Alberta government imposed a limited royalty in an attempt to increase its managerial power over provincial resources and to redress its perception that it was not receiving a proper share of petroleum and natural gas revenues. The petroleum and natural gas industry was no longer in a nascent stage and the relative bargaining positions of government and industry change according to the extent to which the resources are proven and the state of development of the industry. As the industry develops the balance of power shifts in favour of the government.[96]

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96. T. Daintith, supra n. 57 at 3.

"The facts of oil exploration and exploitation are such as to make it quite likely that the state will feel a strong desire for a readjustment of its relationship with the oil company at some point in the process, by reason of the massive power shift which occurs at the time of commercial success in exploration. Up to this time, the exploring company holds all the cards, even in dealings with a government it is able to call on considerable resources of technical expertise: it has not only expertise in large measure, but also capital and the willingness to shoulder substantial financial risks of exploration, while the government lacks knowledge of the extent of its resources and may be in competition with other comparable territories to attract the company's scarce exploration resources. With the finding of oil in commercial quantities, however, the positions are reversed: the government, in a strong position by virtue of its now proven oil resources, is conscious of substantial profits made or to be made by the company by reason of the favourable terms originally offered, while the company's bargaining position is weakened by being tied to the important financial commitment already made, and by the fact that other companies are doubtless ready to step into its shoes to undertake production free from exploration risks. The consequent pressures on the relationship may be multiplied by the influence of external factors, such as the dramatic increases in world oil

> prices in 1973-74. Against this background it is not surprising that, even in Western states anxious to do nothing to harm the global interest of "their" oil and other mineral companies, abrupt and unilateral changes in the state-company relationship may sometimes be imposed."

It was within the context of this natural evolution,[97] that a variable royalty was imposed under the revised 1962 Mines and Minerals Act.[98] When this royalty was introduced, Premier Manning personally intervened to assure companies, that despite the new legislation, the royalty rate would only be revised at ten

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97. J. W. Brooks, "Legal Problems of Geothermal Resources" (1966) 6 Nat. Res. J. 511 at 532. T. Dainith, supra n. 57 at 3. The following statement specifically addresses geothermal legislation but the relevancy of its principles has a wider application:

> Economic standards in geothermal steam legislation are of vital importance to the entrepreneur; for, in such a nascent industry, risks are high and unascertained. Conversely, because of that same dearth of geological and economic information, the Government is chary of tying itself to fixed provisions which prove to be so favourable to the risk-taker that the Government goes relatively unrewarded for making available its land. It is natural, therefore, that private interests and the Government have come forward with quite different proposals for rental and royalty terms of geothermal steam leases. Nor is the disagreement totally economic. The Government's interests are fostered by provisions allowing for the maximum exercise of judgment and discretion.

98. Mines and Minerals Act, S.A. 1962, c. 49.

year intervals. This assurance was intended to encourage a stable investment climate and it was reinforced by a provision in the 1962 Act imposing a ceiling of sixteen and two thirds percent on the variable royalty rate.[99]

This undertaking and this provision did not survive the increased oil prices which followed the 1973 O.P.E.C. oil embargo. The changed circumstances provided the government's justification for further amendments to the royalty structure. Legally, these amendments were effected by repealing the section of the Mines and Minerals Act establishing the 16 2/3% ceiling and by introducing a new royalty system which contained a supplemental production based royalty.[100]

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99. A.R. Thompson, supra, n. 69 at 3.

100. The Alberta government first offered lease holders a tax incentive to renegotiate their leases and assume the higher royalty rate. Few lessees did so and in 1973 an amendment to the Mines and Minerals Act was enacted which declared that all maximum royalty provisions were void. This section is found in the current Act. Section 113(4) provides:

> (4) Any provision contained in a lease of petroleum and natural gas rights, natural gas rights or petroleum rights granted by the Minister before December 14, 1973 and stating
>
> (a) that the maximum royalty on the petroleum during the first term of the lease shall not exceed 1/6 of the gross recovery from the lands described in the lease,
>
> (b) that the maximum royalty payable on the petroleum and natural gas during the initial 10-year term of the lease shall not exceed 1/6 of the production obtained from the location,

2. Royalties and Constitutional Limitations

It was argued that the government could not rely on its contractual power to amend the lease for increases beyond 16 2/3%, despite the presence of a variable royalty provision and the compliance with laws clause. The argument was premised on the assumption that the contractual right to vary the royalty was limited by the 16 2/3% ceiling contained in the legislation and certain leases and that any increase above that level would not be valid as a matter of contract.[101] This meant that the increase could only operate as a matter of legislation and the question became whether this legislative alteration affected the vested rights of lessees. To strike down the increase it was argued that

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> (c) that the maximum royalty payable on natural gas during the first term of the lease shall not exceed 1/6 of the production obtained from the location, or
> (d) that the maximum royalty on petroleum during the first term of the lease shall not exceed 1/6 of the production obtained from the location,
>
> and any provision to a like effect contained in such a lease, is void.

101. D.E. Thring, supra, n. 87 at 87:

> Reading the agreement as a whole, it is entirely possible that a court might interpret the conflicting 'variable royalty' and 'royalty ceiling' provisions as contemplating a changing royalty limited by the 16.6% maximum ceiling. In other words, the province's right to vary the Crown royalty, in so far as that right is reserved in the lease, may be limited by the provision guaranteeing the royalty ceiling.

the increase over the 16 2/3% maximum was a levy which more closely resembled a "tax" than it did a genuine royalty. If it was a tax, then arguably it was ultra vires because it was an example of indirect taxation. Provincial "royalties" were struck down by the Supreme Court in Canadian Industrial Oil and Gas Ltd. v. The Government of Saskatchewan,[102] because they constituted

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102. Hereinafter referred to as CIGOL (1977) 80 D.L.R. (3rd) 449.

The Saskatchewan legislation attempted to divert post 1973 oil and gas profits to the government. Two essential characteristics of the scheme were: 1) an expropriation of certain freehold oil and gas interests and the introduction of a mineral tax and 2) the imposition of a "royalty surcharge" representing one hundred percent of the "windfall profits". Both amounts were a function of the well-head price.

The Saskatchewan Court of Appeal [1976] 2 W.W.R. 356, 65 D.L.R. (3d) 79 upheld the surcharge as a royalty, or alternatively, as a direct tax, on the basis that the levy could not be passed on to consumers by way of a price increase. It was reasoned that any increase to the well-head price would correspondingly increase both the mineral income tax and the royalty surcharge. The Court did not question provincial expropriation powers. It is interesting to note the operative assumption in the Court of Appeal is that expropriations effected under section 92(13) gave the powers under section 92(5) to impose royalties. It had been a point of controversy whether all lands owned by the province, regardless of their source, became public lands for the purposes of section 92(5).

The majority decision of the Supreme Court, outlines that the oil and gas leases expropriated were granted by freeholders and the rate of royalty was set. While section 28(1) of Bill 42 purported to preserve the "rights" of these lessees, the royalty became the Crown rate with the overall effect that producers on Crown lands were compelled to sell at rates set by the Minister, were subject to a profit freeze and could not cease production.

indirect taxes beyond the legislative competence of the province.

This argument is now of purely academic interest in light of the augmented provincial taxing powers over non-renewable

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Tampering with acquired rights prompted Martland J. to the conclusion at 561:

> "This levy (royalty surcharge) thus imposed cannot, in my opinion, be a royalty. The royalty payable by the lessee was fixed by the terms of the lease, and that lease was preserved by the terms of subsection 28(1). It was not expropriation by the Crown . . . but a tax upon the lessee's share to which he was lawfully entitled." (emphasis added)

Before this decision the difference between royalties and taxes was not always clear. A royalty has been defined as a "share in production reserved to the lessor in consideration of the lease" in B and B Royalties Ltd. v. M.N.R. [1940] 4 D.L.R. 369 and a tax is " a compulsory contribution imposed by the sovereign for public purposes or objects. (Lawson v. Interior Fruit and Vegetable Committee [1931] 2 D.L.R. 193. The Supreme Court in CIGOL did not attempt to set the perimeters of either concept. The fact that the royalty surcharge was imposed after all other existing royalties and that it did not represent a "share", (it was a one hundred percent levy) were important factors in deciding that a "tax" was imposed. The majority then held that it was indirect.

In Dickson's dissenting judgment, the tax on the expropriated leases was held to operate as legislation because it affected people who had no contractual relationship with the Crown. The obligation was said to arise "out of legislation command, not by a process of negotiation between free wills, resulting in a meeting of minds." All judges agreed that the "royalty surcharge" was not a royalty; the difference of opinion centered on the directness of the tax. And each judge suggested that the underpinnings of a veritable royalty are consensual. This fact lends limited support to the contention that any variation in the royalty rate must of necessity operate as legislation.

resources conferred by The Canada Act, 1982.[103] Section 92A(4) now gives the province the right to raise money by any mode or system of taxation, thereby invalidating the previous distinction drawn between direct and indirect taxation. This new provision means that royalties can no longer be challenged on the ground that they are indirect taxes.

There is little doubt that a province can regulate the manner and extent of the royalties derived from its natural resources. This is so whether royalties are viewed as rent or more generally as consideration for oil and gas rights.[104] It should also be noted that the decision in A.G. Alta v. Huggard Assets[105] upheld the province's imposition of a variable royalty so there is little chance that a variable royalty could be successfully challenged as uncertain.

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103. Section 92(A)(4). For a general comment on the province's new taxing powers see William D. Moull, "The New Constitution and Provincial Taxation", paper presented to the Mining Law Institute, June 23, 1983, Saskatoon.

104. "The right of the Crown to levy royalties is indisputable" per Culliton C.J.S. in the Court of Appeal in C.I.G.O.L. [1976] 2 W.W.R. 356, 65 D.L.R. (3d) 79 at 95 and per Dickson at the Supreme Court: "Subject to limits imposed by the Canadian constitution the power of the province to tax, control and manage its natural resources is plenary and absolute." [1978] 2 S.C.R. 545 at 574.

105. [1953] A.C. 420.

3. The Legal Effect of Variable Royalties

There are few remaining grounds on which royalty increases can be attacked. The definition of royalty in the CIGOL case suggests that it must be an essentially consensual levy which results from the parties' lessor-lessee relationships and not from their legislator-subject relationship. This means that the distinction between the Crown's dual capacities continues to be relevant, not for constitutional purposes, but to determine whether the royalty increase is imposed as a matter of contract or as a matter of legislation. If it operates as legislation then it may be confiscatory and raise the issue of compensation for the expropriation of vested rights.

The chances of a lessee ever successfully claiming compensation for increased royalties are very slight indeed. First, the compliance with laws clause and the variable royalty provision are sufficiently wide to ensure that the government retains the contractual right to vary royalty rates and second, it is doubtful whether royalty increases, even if imposed as a matter of legislation, are truly expropriatory in the necessary legal sense.

The royalty provisions in the Act clearly envisage that royalties will be set from time to time.[106] These statements

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106. Section 113 reads:

become incorporated contractual terms in leases and are the legislative conditions which govern the grant of present day licences. They illustrate the government's commitment to obtaining its share of the available economic rents. In relation to licences, which do not contain the compliance clause, it may be argued that the Crown's express statutory power to vary prevents the licensee from ever obtaining the vested right to pay a set and certain royalty.

The current contractual royalty provision found in petroleum and natural gas leases is stated in the following terms:

> The lessee shall pay to the Minister
> (b) a royalty on all petroleum and natural gas won, worked, recovered or obtained from the location, and on all products

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> The petroleum and natural gas obtained pursuant to any agreement acquired under this Part is subject to the payment to the Crown of the royalty thereon that is from time to time prescribed by the Lieutenant Governor in Council.
>
> "Agreements" in s. 1 means any lease, licence, reservation, permit or certificate of record or any other agreement made or entered into under
>
> (i) this Act or the former Act, or
> (ii) The Provincial Lands Act or the Dominion Lands Act (Canada) and relating to a mineral,
>
> but does not include a unit agreement under Part 8.

> obtained from petroleum and natural gas, at the rate or rates as are now or may from time to time be prescribed by the Lieutenant Governor in Council; the royalty to be free and clear of any deductions. (emphasis added)

This provision solidifies the Crown's contractual right to alter the royalty rate although it is arguably superfluous due to the general operation of the compliance with laws provision. If, however, the operation of that clause was ever limited by the acceptance of one of the arguments put forward in the previous section, then the express right to vary the royalty rate may be of independent value.

The contractual right to vary the royalty rate is not retained in licence agreements. This is somewhat surprising as licences do not contain compliance clauses. The absence of the royalty clause could be explained if licensees did not have the right to produce under their interests, but this right is expressly given in s. 10 of the Regulations. Licensees will, however, be bound, as subjects of the Crown, by properly framed royalty increases, i.e., increases which apply retroactively to all licences whenever granted. Licensees who took their interests subject to the legislative declaration of variability have no "right" to a fixed royalty which can be altered by subsequent royalty increases. Licensees with the right to pay a fixed

royalty may argue that royalty increases constitute a confiscatory legislative amendment which gives them a right to claim compensation from the Crown.

It is extremely unlikely, however, that this expropriation argument will ever be accepted, even in the limited cases where it can be made. In support of this argument, a possible analogy could be drawn with the case of A.G. for Alta. v. Majestic Mines[107] where the Supreme Court held that section 2 of the Transfer Agreement Act prevented the province from imposing a royalty. Although this case dealt with the imposition of a royalty and not its increase, one could argue that the court's main interest was to protect the producer's right to determined profits under the initial agreement. The claimant would have to establish that paying a fixed royalty was a vested right and that the royalty increase affected that right so much that it amounted to a confiscation of it. That is a heavier burden than showing an alteration under the Transfer Agreement so the analogy to Majestic Mines may be of limited utility.

It is difficult to imagine a court ever accepting this argument because even though royalty increases cause direct decreases in profitability, it is hard to see why they are

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107. [1942] S.C.R. 402.

expropriatory. Royalty increases are similar to tax increases as both alter the rights of individuals but they do not fall squarely within the legal requirements of an expropriation.[108] Even if, for some reason, they are confiscatory, there is an absurdity in requiring the Crown to pay compensation to interest holders when the purpose of the legislative change in the royalty rate is to augment Crown revenue.

In conclusion, the contractual and statutory provisions which authorize royalty revisions cannot be attacked on any significant legal grounds. Section 92(4A) of the Canada Act 1982 removes the possibility of a constitutional challenge on the grounds of indirect taxation, the decision in Huggard Assets prevents attack on the grounds of uncertainty, the power to vary is expressly reserved and there is little room to argue that royalty increases are expropriatory in a legal sense. The royalty provision is an excellent example of how a government can retain flexibility on an important matter without assuming compensatory legal obligations. The express variability of the provision prevents the need for retroactive legislation and prevents the vesting required to support a claim that rights have been expropriated.

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108. Chapter V deals with the legal requirements for an expropriation.

C. Conclusions on Contractual Variation Devices

The Alberta government has, through the compliance with laws provision and the variable royalty clause in leases, secured contractual means to exercise the flexibility it requires to meet changing societal demands. These methods are especially attractive to the government as midstream variations can be made to resource agreements without running the risk of the compensatory obligations otherwise associated with expropriatory enactments. The attraction of these contractual provisions arises because they prevent the vesting of an initial right or remove the element of compulsion necessary to support the argument that an expropriation had occurred.

From the government's viewpoint of securing maximum flexibility these contractual provisions suffer two deficiencies. The first is procedural because a statutory or regulatory amendment is required before a change in government policy can be effected. Changes must therefore be approved either by the Legislature, the Lieutenant Governor in Council or the appropriate Minister. This procedural formality will not inhibit Crown flexibility although it may be seen as a limited safeguard promoting the judicious use of Crown powers.

The second limitation is substantive and results partly from the first. It is difficult to use these contractual powers to resolve individual disputes or to effect individual changes. In

most cases these powers are used to implement changes which apply generally, or to all agreements falling within a particular class. Thus, the requirement of a legislative amendment means that the current contractual variation device is more appropriate to cases where the Crown wants to alter the royalty payments of all producers of provincially owned resources rather than those of an individual producer. An express power to unilaterally vary the terms of grant, without relying on the current incorporation by reference technique, would promote the type of flexibility required on a case by case basis but would reduce whatever security of tenure is presently enjoyed by lessees.

There is a third limitation to these contractual techniques but it is not a deficiency in the clauses themselves. They are contractual provisions so they can only secure flexibility vis a vis persons who are in privity of contract with the Crown. This means that producers of freehold petroleum and natural gas can only be controlled through regulatory techniques and not contractual ones. There is nothing surprising in this fact but the presence of the clause in Crown grants may mean that the Crown will regulate freehold petroleum and natural gas differently from provincially owned petroleum and natural gas. This happened when the Lougheed government announced production cutbacks in October 1980, in an attempt to improve its bargaining position in the federal/provincial negotiations over oil pricing policy. Production was only reduced on Crown petroleum while freehold production

was not similarly curtailed. Much of this can be explained by the fact that the provincial government was trying to rely on its ownership powers to justify a legislative enactment what might otherwise have been beyond the province's powers under the British North America Act, 1867 but it was also easier for the government to proceed in this way to avert possible claims of expropriation. Although constitutional limitations have been removed by the Canada Act, 1982, the distinction between the techniques available to control freehold and Crown resources continues to be an important one.

From the viewpoint of industry, the compliance clause and the variable royalty provisions put them on notice that they must assume the risks associated with the Crown's variation powers. This realization does not promote their security of tenure, it merely gives the impression of an enlightened choice. The only security enjoyed by lessees and to a lesser extent by licensees, results from the feeling that the Crown will not use its variation powers regularly or in a capricious or discriminatory fashion.

CHAPTER IV
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CHAPTER IV

MINISTERIAL DISCRETION

Introduction

Chapter II outlined the general scheme of the Alberta Mines and Minerals Act and discussed the legal nature of the interests granted under it. In that context, the presence and extent of statutory discretion was important to determine what rights vested in licensees and lessees. The focus was on how contractual or proprietary rights were affected by discretionary powers. In this Chapter ministerial discretion is studied in greater detail and with a slightly different emphasis. Discretion is analyzed as an administrative method of providing flexibility and the different types of discretion in the Act will be reviewed to see what level of flexibility they attain and how they affect a grantee's security of tenure.

Discretionary powers are said to hold a special place in natural resource legislation because they constitute a quick, easy and informal way to implement changes in government policy. The 1976 revision of the Mines and Minerals Act extended discretion in many areas. At the time the Minister commented:

> But I just want to point out that there's very little new discretionary power in the Act. The majority of it was already in the

> Act, in existing legislation, and is now being repeated. Some is and its because its so difficult to foresee the variety of circumstances that will face a lessee, with weather, with the depth of drilling that will be necessary, with the new features of the legislation which involve the severing of deep rights. It was very difficult to foresee all the circumstances that would face companies, to try to capture all those circumstances within legislation. Indeed, you will notice we have provided considerable scope for regulations. Even to capture them by regulation, I think would be virtually impossible. Therefore, in many cases now a company or an individual comes in with a set of circumstances and says, look, here is my problem: a bridge is out, my lease runs out, I can't get on the location. The circumstances can hardly be described in legislation or regulations, and discretionary rights for the minister appear to be the only way to deal with those circumstances.[109]

Discretionary powers currently exist in the acquisition of leases and licences, their terms and conditions and form, their renewal, suspension, and termination. All discretionary powers introduce a degree of uncertainty into the decision-making process but some have more drastic effects on security of tenure than others.

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109. Mr. Getty, Alberta Hansard, May 18, 1976 at 1391.

In this context, security of tenure means the level of protection a grantee enjoys from the arbitrary or capricious use of statutory powers. An aggrieved grantee has different types of recourse against the decision-maker. The basic distinction is between political remedies and legal ones and I confine myself to the latter. Legal remedies include appeal rights given by the Mines and Minerals Act, judicial review, and in certain cases, contract law remedies.

For the purposes of analysis, I ask the general question whether the discretionary decisions of the Minister are reviewable in light of the doctrine of ministerial responsibility and the contractual nature of his function. This is followed by a review of statutory duties and a section on discretionary powers. I set out the general jurisdictional and procedural grounds for judicial review of discretionary statutory decision-making powers and tie them to the range of discretionary powers under the Alberta Mines and Minerals Act. In this discussion the common division of statutory powers into executive, legislative, judicial, quasi-judicial, administrative and/or ministerial functions is avoided as much as possible. This division does not add to the analysis as the classification of powers seems to depend more on whether or not the courts wish to review the decision rather than on any a

priori basis.[110] The purpose of this Chapter is to focus on the manner in which administrative remedies affect the interplay between flexibility and security of tenure without canvassing the entire field of administrative law.

A. The Reviewability of Ministerial Decisions

1. Doctrine of Ministerial Responsibility

When decisions are entrusted to Ministers of the Crown it is important to distinguish whether the Minister is acting as an agent of the Crown or merely as the designated repository of a statutory decision-making power. If he is acting for the Crown, the doctrine of ministerial responsibility may sometimes be used to insulate his decision from judicial review.

In Florence Mining Co. v. Cobalt Lake Mining Co. Ltd.[111] the judge, when asked to determine why the minister had not granted a timber license, remarked:

> "I refused at the trial to compel the Minister to say why this sale was made as it was, or

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110. S.A. de Smith, Judicial Review of Administrative Action J.M. Evans ed. (4th ed., 1980) 281. For a discussion of whether legislative function can be reviewed see the section on the Minister's Power to Order Production Cutbacks at pages 155-161, especially footnote 192.

111. (1909) 18 O.L.R. 275 at 278.

> why the plaintiffs did not receive a patent. In my view, the advisers of His Majesty are not responsible to the Courts for their official acts and advice. They are responsible to the Legislature and to the representative of His Majesty, and in the last resort to the people; but the Court has no right on such a record as this to ask or to consider the motives actuating any Minister of the Crown."

It is often difficult to determine when the Minister is acting as a representative of the Crown and when he is acting as a persona designata under a statute. In one case the subject matter of the power was determinant. In Re Fisheries Act[112] the court refused to review the Minister's decision because it involved the ownership and leasing of public property. This case could be extended to most of the Minister's decisions under the Mines and Minerals Act because they concern the disposition of provincially owned petroleum and natural gas, but it is unlikely that the subject matter of the power will be the only variable considered by the courts. The present attitude of judicial activism suggests the courts would not create a broad category of powers beyond judicial review.

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112. [1926] S.C.R. 457, See also A.G. Can. v. A.G. B.C. [1930] A.C. 111.

In recent times, courts have tended to treat all statutory powers, including those enjoyed by the Ministers, as forming part of a continuum, with judicial determinations at one end and political decisions at the other. They treat the Minister's discretionary powers as reviewable on the same jurisdictional grounds as other decision-making powers by withdrawing the blanket immunity of ministerial responsibility and classifying the Minister's powers as statutory powers and not as prerogative ones.[113] Ministers of the Crown are theoretically bound to exercise statutory discretion according to the same principles which govern inferior officials.[114]

The growing judicial trend to review all types of decisions has even extended to certain matters touching the Crown's

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113. For a recent example of a strict approach see Calgary Power Ltd. v. Copithorne [1959] S.C.R. 24 where the Supreme Court refused to review an expropriation order made by the Minister. In the course of his judgment Martland J., stated at 33:

> . . . his decision is as a Minister of the Crown and, therefore, a policy decision, taking into account the public interest, and for which he would be answerable only to the legislature . . .

Even if one was prepared to argue that the Minister was acting as a Minister of the Crown it may be possible to confine that status to the granting or refusing of the interest and its terms and conditions and not every decision taken during the course of the lessor-lessee relationship.

114. H. Molot, "Administrative Discretion and Current Judicial Activism" (1979) 11 Ottawa L. Rev. 336 at 340.

prerogative powers. Traditionally, courts only reviewed decisions taken under the prerogative if they were beyond the scope of the power.[115] It now appears that there is a movement to review them in much the same way as other statutory powers.[116]

The House of Lords decision in Padfield v. Minister of Agriculture[117] shows a retreat from the immunity of ministerial responsibility.[118] The court interpreted a subjectively worded statutory power as a duty because it believed the purposes of the act would have been frustrated if the Minister could have elected not to exercise his power. The Minister justified his refusal to exercise his discretion on the ground that he was concerned with the possible political consequences which may have arisen had the power been exercised. The House of Lords reviewed the Minister's decision despite this reliance on the public policy aspects of his decision-making powers. They held that if the Minister was actually motivated by political concerns, rather than the merits of the individual application, then his mind was effected by

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115. A.R. Lucas, infra n. 119 at 19.

116. Henry Molot, "Administrative Discretion and Current Judicial Activism" (1979) 11 Ottawa L. Rev. 337 at 342.

117. [1968] A.C. 997.

118. Canadian courts have tended to follow the initiative of English courts in administrative law. See D.P. Jones, "The Supreme Court of Canada and Administrative Law" [1975] 14 Alta. L. Rev. 1.

irrelevant considerations which would provide a ground of review. The court's reasoning on this point illustrates how far it has retreated from immunity.

However, the doctrine of ministerial responsibility lingers and its remnants are still felt as discretionary decisions edge towards the political end of the continuum, because Canadian courts remain reluctant to review decisions with large public policy components. The doctrine sometimes will not prevent review but it may affect its scope. The courts often treat decisions of the Minister somewhat differently from decisions of other statutory decision-makers even when they review them on jurisdictional grounds. The following quote explains why this continues to be the case despite the general widening of judicial review.

> They are elected officials and they impart a political aura to any decision made, particularly statutory decisions that are an element of, or are related to, broader matters of government policy. This point is difficult to articulate and even more difficult to demonstrate. But it is arguable that courts in effect demand a higher standard of persons challenging statutory Ministerial decisions. The problem is complicated by the fact that Ministerial statutory powers are often conferred broadly without decision criteria or even without indication of the governing policy. In these circumstances, it may be

> difficult or impossible to determine the "proper" decision or to confidently identify relevant or irrelevant considerations.[119]

It may therefore be very difficult for the government to claim that the Minister's discretionary powers are beyond the scope of at least a modest judicial review.

2. Are the Minister's Powers Under the Mines and Minerals Act Regulatory?

There is a distinction between the contractual and administrative remedies available to a grantee even though the operation of the compliance clause tends to blur this distinction, e.g. if the Minister were to terminate a lease for an improper reason, the lessee would have two types of remedies: he could pursue the Crown for breach of contract,[120] or he could attack the decision

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119. A.R. Lucas, "Ministerial Discretion in Natural Resource Development", paper presented at a conference on the Public Disposition of Natural Resources, Banff, April 1983 at 20.

120. The Crown can sue and be sued. At one point the Crown enjoyed special immunities and privileges in the courts of the realm. The adage that the King could not be sued in his own court led to the adoption of a petition of right system where a potential plaintiff was obliged to secure the consent of the Crown before his suit could be entertained. Petitions could, and in the event of a prima facie case would, be awarded where a breach of contract was claimed. Most procedural impediments have been removed by the Proceeding Against the Crown Act. R.S.A. 1980 C.P.-18. Section 26 abolishes proceedings by way of petition by right. Section 4 allows proceedings to be taken directly if under the previous system the claim could be enforced by petition of right,

as being beyond the Minister's statutory powers. In either case, the wrongful cancellation would be open to judicial censure. In this Chapter only the grantees' administrative remedies are studied but most types of ministerial decisions, except those involving a refusal to grant an interest, may also constitute contractual breaches.[121]

A further question arises concerning the relationship between an interest holder's administrative and contractual remedies: are the incorporated statutory lease terms both contractual and statutory provisions so that a lessee has alternative remedies or are the incorporated provisions only contractual terms which the Crown imposes as a contracting party? If the legal operation is entirely contractual then a lessee may not have administrative remedies. Another way of asking the same question is to consider whether the Minister's powers under the Mines and Minerals Act are regulatory in the sense necessary for judicial review.

In his recent article on Ministerial Discretion and Natural Resource development, Professor Lucas draws attention to what he

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subject to a fiat. Where there existed an express power to contract, as in the Mines and Minerals Act, there would have been no problem in maintaining a petition of right.

121. There are no contractual obligations in the decision to grant or refuse an interest.

calls the "Property-Regulatory Interface".[122] He asks whether the Crown's ownership of petroleum and natural gas means that its powers flow from its status as an owner and not as a regulator. If the Crown acts only as an owner then its powers would be contractual and would not attract the application of administrative law principles. This grey area between government regulation and its contractual rights is highlighted in four recent decisions.

In Cordsen v. Greater Victoria Water District[123] the court held that a public body could prevent a contiguous landowner from trespassing on its property, without following the procedural principles of fairness, because that type of decision could lawfully be made by any landowner. This reasoning suggests the existence of certain powers which the Crown exercises exclusively as an owner and which are not therefore open to judicial review.

The courts were, however, willing to see government actions as matters of regulation in two of the other cases. In British Columbia Development Corp. v. Karl A. Friedmann Ombudsman and A-G B.C.[124] the British Columbia Court of Appeal held that the

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122. A.R. Lucas, supra n. 119 at 7.

123. (1982) 134 D.L.R. (3d) 456.

124. (1981) 130 D.L.R. (3d) 565 rev. (1982) 139 D.L.R. (3d) 307.

decision to refuse a Crown lease was a "matter of administration" and therefore, within the ombudsman's jurisdiction. The court felt that the determining factor was whether or not the decision was made under a governmental power. Similarly, in Re Turcotte and Nolan[125] the court classified the power to grant or refuse placer leases as administrative and required adherence to the dictates of procedural fairness although it did not expressly base its decision on that ground.[126]

An interesting case is Maligne Buildings Ltd. v. The Queen,[127] because it dealt with rental increases for leases of Crown lands. The leases gave the Minister of Northern Affairs the power to set the yearly rental at fixed intervals. The Minister exercised this power in March, 1980. The lessees challenged the increase on the ground that the decision lacked procedural fairness. The Federal Court rejected the challenge at p. 709 because:

> " . . . in my view the Minister's decision to increase the ground rents was not the type of administrative decision upon which Courts have recently placed an implied duty to act fairly, that is a duty to adopt and follow certain

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125. (1981) 130 D.L.R. (3d) 562.

126. A.R. Lucas, supra n. 119 at 9.

127. (1982) 131 D.L.R. (3d) 704.

> fair administrative procedures. The ministerial decision was a purely contractual matter arising from the leases between the parties."

In the Maligne decision the power to increase the rentals was found only in the lease and not in the National Parks Act, which was the relevant statute. There was, therefore, no statutory provision or regulatory decision which could have been reviewed. This case cannot therefore, stand for the general proposition that the terms of a Crown grant cannot be attacked on administrative law grounds.

These four cases illustrate the importance of the "property-regulatory interface" but do not resolve any of the issues raised by it. It is my opinion that decisions taken under the Mines and Minerals Act have a separate existence as regulatory matters and should be reviewable as such. There is a legal and theoretical distinction between regulatory powers and contractual provisions despite the incorporation by reference effected under the compliance clause. The distinction should not be blurred for the purposes of judicial review, especially if it would limit a grantee's remedies. When a grantee seeks judicial review of a statutory power he should not be declined a remedy merely because the Crown claims it acts as an owner and not a regulator.

There is another aspect of the "property-regulatory interface" worthy of note. It has been argued that one effect of the compliance with laws provision is to place the Minister's decisions beyond the purview of judicial review.[128] The lessee's contractual consent to unilateral variations is said to prevent attack on the basis of administrative law principles as well as contract law principles. This argument is not very attractive because it would leave lessees without administrative remedies and it fails to recognize the separate existence of the Minister's Mines and Minerals Act powers as regulatory provisions. Even if one accepted the premise of this argument one could argue that the consent of lessees under the compliance clause only extends to decisions within the jurisdictional and procedural confines of the Minister's power. Thus, the compliance clause would not validate an ultra vires regulatory decision as a binding contractual term.

The doctrine of ministerial responsibility and the "property-regulatory interface" illustrate some of the differences between decisions taken under statutes like the Mines and Minerals Act and the decisions reviewed in the typical administrative law case. Generally, courts review decisions of administrative tribunals which do not possess residual powers but this chapter deals with

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128. Peter Schmidt, "The Crown as Contracting Party as Affected by Ministerial Discretion" (1965-66) 4 Alta. L. Rev. 358 at 362.

Ministers who grant private rights in public property. While the particular political and contractual aspects of some of their decisions should be accommodated, it is my conclusion that the discretionary powers of Ministers should generally be accorded the same legal treatment as statutory powers granted to other decision makers.

B. Statutory Duties

Legislation which grants statutory decision-making powers must specify to whom the power is given and the limits of his jurisdiction. If a repository of a decision-making power acts outside of his jurisdiction the decision may be reviewed by the courts and quashed. All persons who exercise statutory decision-making powers are under a legal duty to act in a specific way but the scope and intensity of the duty varies according to the type of decision-making powers granted.[129] Powers can either be mandatory or discretionary. Mandatory powers include cases where the "Minister shall" do something if certain circumstances are present. The judgment of the decision-maker has little or no relevance for a decision expressed in terms of a mandatory statutory duty.

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129. J.H. Grey, "Discretion in Administrative Law", (1979) 17 Osgoode Hall L.J. 107 (1979) at 109.

A statutory duty may essentially take one of two forms. First, the decision-maker may merely be under a duty to exercise his jurisdiction. If he refuses, he may be compelled to do his duty by an order of mandamus[130] but the order will only force him to exercise his jurisdiction, it will not tell him how it should be done. This occurs when the statute says that the Minister shall decide but the content of the decision is within the Minister's discretion. An example of this can be found in s. 101(2) which outlines how leases can be extended beyond their primary terms. It reads:

> If the lessee fails to make an application under subsection (1) within the time prescribed in that subsection, the Minister shall decide the part or parts of the location to be continued or further continued under the lease, as the case may be.

Thus, an order of mandamus would require the Minister to make a decision but it would not outline which parts of the location would be continued; that decision is left to the discretion of the Minister. This gives only limited security to aggrieved interest holders because a court will not substitute its discretion for

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130. David J. Mullan, Administrative Law (2nd ed. 1979) ss. 174 et seq. Hood Phillips, Constitutional and Administrative Law (5th ed. 1973) 542.

that of the Minister. Mandamus is a coercive weapon but it is only of limited utility where this type of statutory duty exists.

An interest holder may request mandamus if he can show that a statutory duty vested in the decision-maker, that the duty was owed to him, and that the decision-maker refused to do his duty or did so improperly. An attempt to make such an argument occurred in the Saskatchewan Court of Appeal in Re Central Canada Potash et al v. Minister of Natural Resources of Saskatchewan[131] where the plaintiff sought an order of mandamus compelling the Minister to give a production licence for the amount of potash it had initially applied for and not for the lesser amount actually granted by the Minister. In rejecting the writ, the court stated:

> Neither the Mineral Resources Act nor the Regulations thereunder impose a peremptory duty on the Minister, or create a legal right in the applicant to obtain a producing license. The duty of the Minister, both under the Act and Regulations, is to the Crown and not to the producers. Under these circumstances mandamus does not lie . . .

The second type of statutory duty gives greater security to interest holders because it imposes the duty to decide in a

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131. (1972) 32 D.L.R. (3d) 107, upheld (1973) 38 D.L.R. (3d) 317.

specified way. Interest holders, as the beneficiaries of the duty, could require its performance in kind. The second type of statutory duty differs from the first because interest holders are given a legally protected right to a given result and not merely the right to a decision.

Mandatory statutory powers tie the hands of government officials by binding them in a legally enforceable manner and are undesirable from the perspective of a government seeking maximum flexibility. It is therefore not surprising that few decisions under the Alberta Mines and Minerals Act are mandatory in this second sense. Instances where the Minister "shall" effect a particular result are limited to relatively mundane matters and do not extend to the factors which govern the nature of an interest holder's rights and therefore his security of tenure.[132]

C. Discretionary Powers

Discretionary powers force a choice between alternatives.[133] They presuppose that there is no uniquely right answer and require the decision-maker to use individual

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132. See section 17(1) concerning certificates of title and s. 18(1)(3) concerning fees which appear as isolated instances of duties which are mandatory in this second sense.

133. Julius H. Grey, "Discretion in Administrative Law" (1979) 17 Osgoode Hall L. J. 107 at 107.

judgement.[134] The sovereign legislature may elect to regulate through the judgement of a designated decision-maker and this makes the courts reluctant to intervene and substitute their discretion under the guise of judicial review.

Most writers note the increased use of discretionary powers as a regulatory tool, especially in natural resource legislation.[135] Modern legislation contains more discretionary powers, drafted in increasingly wider terms. Despite the apparent breadth of discretionary statutory powers they are subject to certain inherent limitations. The best statement of this principle is found in the landmark case of Roncarelli v. Duplessis:[136]

> In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power, exercisable for any purpose, however

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134. J.M. Evans et al, Administrative Law Cases, Text and Materials (1980) 601.

135. A.R. Lucas, supra n. 119 at 1; A.R. Thompson, supra n. 69 at 17; Raymond D. Schachter, "Controlling the Ministers" (1978) 16 Alta. L. Rev. 388 at 388.

136. [1959] S.C.R. 121 at 164.

> capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily imposes good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption.

1. Judicial Review of Discretionary Powers

Decision-makers with discretionary powers must therefore stay within the confines of their jurisdiction.[137] The Minister's jurisdiction under the Mines and Minerals Act is therefore subject to substantive limitations of vires and procedural limitations of fairness. In this section I present the basic principles of judicial review as a prelude to a discussion of their application to the discretionary decision-making powers under the Mines and Minerals Act in the following sections.

(a) Jurisdictional Grounds

All discretionary powers must be exercised according to law and increasingly courts refuse to recognize the existence of "unfettered" discretionary powers and require that decision-makers

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137. J. Grey, supra n. 133 at 1.

respect the boundaries of their jurisdiction.[138] Reviewable defects include the failure to acquire or exercise jurisdiction properly.[139] In judicial review, the courts address the narrow issue of whether a particular decision is authorized by the statute and not the larger issues of whether it is correct or fair.

The courts have formulated many principles which help determine whether a decision is within the jurisdiction of the decision-maker. A good summary of the applicable principles is found in the following passage:[140]

> In general, a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it: it must not act under the dictation of another body or disable itself from exercising a discretion in

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138. In Padfield v. The Minister of Agriculture, supra n. 116 at 1060 Lord Upjohn states that discretions can only be "unfettered" in the sense that if the Minister is acting lawfully then the courts will not intervene.

139. For a general discussion of possible defects see R.A. Macdonald and M. Paskell-Mede, "Annual Survey of Canadian Law: Administrative Law" (1981) 13 Ottawa L. Rev. 671. There are sometimes procedural-type requirements before the Minister will be said to have jurisdiction. See sections 10(1)(g), 100(7), 103.1(5) and s. 104.

140. De Smith, Judicial Review of Administrative Action J.M. Evans ed. (4th ed., 1980) 285.

> each individual case. In the purported exercise of its discretion it must not do what it has been forbidden to do, nor must it do what it has not been authorized to do. It must act in good faith, must have regard to all relevant considerations and must not be swayed by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. Nor where a judgment must be made that certain facts exist can a discretion be validly exercised on the basis of an erroneous assumption about those facts.

These principles and criteria are not mutally exclusive and often decisions can be questioned on multiple and interrelated grounds. The recent tendency is to support claims of excess or abuse of jurisdiction by relying on particular principles which have been contravened. There is, however, a movement towards an all-encompassing approach which focuses on the overall "reasonableness" of the decision.[141] Despite this movement, tests based on individual principles still predominate as unreasonable decisions can usually be attacked on the alternative ground that the decision-maker was directed by improper motives or irrelevant considerations.

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141. J.M. Evans et al, supra n. 134 at 623 and 698.

The decision-maker must exercise his discretion in accordance with statutory and regulatory requirements. These requirements may be procedural or substantive but they must be mandatory, rather than permissive, before their contravention will affect jurisdiction. The court decides whether a requirement is mandatory or permissive by reference to the wording and purpose of the enactment. An interest holder rarely benefits from the Minister's failure to adhere to mandatory requirements because the result would often be that the interest would be void.

In Cugden Rutile v. Chalk[142] the empowering statute provided that the Minister "may" grant a mining lease but the grant purported to convey the right to obtain a lease by providing, inter alia, that the grantee "shall be entitled . . . to have granted to him . . . a mining lease." The grantee attempted to enforce this covenant by specific performance but the Privy Council held that the covenant was void because it was beyond the Minister's statutory powers. The statute gave the Minister a discretion to grant or refuse the lease and he could not, even by his own undertaking, impair that power by the terms of a grant. The Privy Council stated:[143]

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142. [1975] A.C. 520.

143. Id. at 535.

> It is clear in their Lordship's opinion, that any attempt by the Minister to bind himself in advance, before the occasion for taking the statutory steps, making the statutory decisions or exercising the statutory discretions arose, to grant a special mineral lease, would be completely outside the Minister's statutory powers . . . No contract could fetter his duty to consider all these matters.

Similar comments on the limiting effects of a mandatory statutory provision can also be found in the Supreme Court decision in Nicholson which will be discussed later in this chapter.[144] This decision establishes that the Minister must comply with mandatory statutory requirements. The effect of this decision is that licences and leases granted for more than the statutorily prescribed duration, or which contravene other mandatory provisions of the Mines and Minerals Act would be beyond the power of the Minister and therefore void. Other mandatory provisions may include the variable royalty provision in section 98.

Decision-making powers are also restricted by the broader principle that they must be exercised in accordance with the

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144. (1978) 88 D.L.R. (3d) 671 at 676. Chief Justice Laskin said that the express reference to an eighteen month period in a Regulation excludes any inconsistent contract.

purposes of the Act under which they are given. In Heppner v. The Minister of Environment et al[145] the court struck down an order in council establishing a restricted development area (RDA) because the Act only gave the power to establish RDA's for matters pertaining to the environment and not for the council's stated purposes of establishing a transportation and utility corridor. This decision of the Alberta Court of Appeal requires that the main purpose of regulations must bear directly, and not merely incidentally, on the purposes of the act they were passed under.[146]

Similarly, in Re Athabasca Tribal Council v. Amoco Canada Petroleum[147] the Supreme Court was faced with the problem of defining the scope and purposes of Alberta's Oil and Gas Conservation Act[148] and Energy Resources Conservation Act.[149] They limited the powers granted under those acts to matters "exclusively concerned with the development of energy resources". The statutory powers could not, therefore, be used to impose

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145. (1977) 6 A.R. 154.

146. R.D. Schachter, supra note 135 at 393.

147. (1981) 124 D.L.R. (3d) 1.

148. R.S.A. 1980, c. O-5.

149. R.S.A. 1980, c. E-11.

requirements promoting the development and social welfare of native peoples.

This decision illustrates the overlap between judicial review based on improper purpose, mandatory requirements, irrelevant considerations and improper motives. The principle that the purposes of the Act must be respected is not limited to matters of delegated legislation, it also extends to statutory decision-making powers.

The basic concepts outlined above will guide a court when reviewing a discretionary decision on jurisdictional grounds.

(b) Procedural Fairness

Statutory decision-makers are under a legal duty to use procedural safeguards when their decisions may affect the rights or interests of citizens. The content of that duty may be defined according to the principles of natural justice or those of fairness, depending upon how the court classifies the decision-making power. In either case, a procedural breach should deprive the decision-maker of jurisdiction and render his decision void. This provides the basis for the court's supervisory jurisdiction.[150]

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150. This statement may be questionable in light of the Supreme Court decision in Harelkin v. The University of Regina [1979] 2 S.C.R. 561. For a full discussion of whether procedural

There is, therefore, no theoretical reason why procedural fairness should be treated separately from general jurisdictional limitations but the growth of this argument as a ground for attacking discretionary decisions justifies its individual treatment.[151]

Before the Supreme Court decision in Re Nicholson and Haldemand-Norfolk v. Regional Board of Commissioners of Police[152] a plaintiff had to establish that the decision-maker was exercising a quasi-judicial function before the procedural protections of natural justice applied. The classification of the statutory power determined the plaintiff's rights and if the power was administrative, the rules of natural justice would not apply. The Nicholson case questioned this reliance on classification and created a duty of fairness which attached to traditionally administrative functions.

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breaches render decisions void or voidable see David P. Jones, "Discretionary Refusal of Judicial Review in Administrative Law" (1981) 19 Alta. L. Rev. 483 at 485 et seq.

151. For an overview of the most important cases establishing the duty of fairness see David P. Jones, "Administrative Fairness in Alberta" (1980) 18 Alta. L. Rev. 351.

152. (1978) 88 D.L.R. (3d) 671.

In that case, Nicholson was dismissed under a section of the Ontario Police Act[153] which provided that officers who had served less than eighteen months could be dismissed by the Board of Police Commissioners, but the section did not specifically require a hearing. The Act only required a hearing if an officer had served for more than eighteen months. Nicholson was dismissed within the initial eighteen month period and alleged that he had been treated unfairly because he was not told why he was dismissed nor was he given the opportunity to respond to the complaints against him.

The majority in the Supreme Court agreed that he had been treated unfairly and quashed the Board's decision to dismiss him. Chief Justice Laskin, speaking for the majority, held that Nicholson could not claim the full procedural protection given to a constable with more than eighteen months service, but that he was nevertheless entitled to be treated fairly, rather than arbitrarily. He noted the emergence of a notion of fairness which involved something less than the procedural protection of the traditional doctrine of natural justice, and justified it in the following terms:[154]

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153. R.S.O. 1970, c. 351.

154. Supra, n. 152 at 681.

> What rightly lies behind this emergence is the realization that the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question.

The content of the duty in this case required that Nicholson should have been informed of the reasons for his dismissal and given an opportunity to respond.[155]

A duty of fairness has now become an accepted part of Canadian administrative law.[156] It was developed further by the

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155. Mr. Justice Martland gave the decision for the minority and held that Nicholson was dismissable, at pleasure, during the eighteen month probationary period. He limited procedural requirments to quasi-judicial functions and did not sanction a duty of fairness for administrative ones.

156. See D.P. Jones, supra n. 150. He argues that the cumulative effect of five cases establishs that a breach of the duty to be fair can be corrected by certiorari, even if no judicial or quasi-judicial function is involved. The courts now focus on the question of whether the procedures adopted were fair in the circumstances and not on how the decision-making power should be classified. The benefits of this approach include, id., at 352:

> The duty to be fair is a much more robust concept. In the first place, it avoids premising the

Supreme Court in M.N.R. v. Coopers and Lybrand Ltd.[157] and applied in relation to cabinet level decision-making in Inuit Taperisat of Canada v. Leger.[158] The law reports contain many decisions where this argument was raised but one particular decision is particularly relevant to resource dispositions under the Alberta Mines and Minerals Act.

In Acro Pace Projects Ltd. v. Registrar of New Westminster Land Title District[159] the British Columbia Supreme Court was asked to quash the objection of the Attorney General to the plaintiffs' request to have unused road allowances returned to

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> availability of judicial review on the existence of a quasi-judicial function, which is not a clear concept in any event. Secondly, it openly articulates the question at least subconsciously asked by the courts in determining whether judicial review should issue for procedural reasons. And, finally, it provides an accurate rubric for administrators of all descriptions to bear in mind when exercising their various functions.

The five cases are Nicholson, supra n. 152; Martineau v. Matisqui Institution Disciplinary Board (No. 2) [1980] 1 S.C.R. 602; Harvie v. Calgary Regional Planning Commission (1979) 8 Alta L. R. (2d) 166 revg (1978) 5 Alta L. R. (2d) 301; Campeau Corporation v. Council of the City of Calgary (1979) 7 Alta. L. R. (2d) 294 revg (1978) 8 A.R. 77; and McCarthy v. Trustee of Calgary Separate School District [1974] 4 W.W.R. 725.

157. [1979] 1 S.C.R. 495, 92 D.L.R. (3d) 1, 24 N.R. 163.

158. (1981) 115 D.L.R. (3d) 1.

159. [1982] 3 W.W.R. 546.

them. Under the British Columbia Land Titles Act[160] owners of subdivided land may ask for the return of road allowances given at the time of subdivision if the land is not subsequently used for public purposes. The request is made to the Registrar of Land Titles but the Attorney General retains a veto in the following terms:[161]

> "No alteration in the boundaries and no closing or cancellation of a highway, park or public square shown on a plan, including a subdivision or reference plan deposited under this or the former Act, shall be made under this or any other Act if the Attorney General opposes the alteration, closing or cancellation."

Three such requests were made by the petitioners and the Attorney General opposed all three. He opposed the first petition on the ground that the land might be required for future use to provide access to neighbouring properties; the second because the land was of value and should require compensation if returned and no reasons were given for the refusal of the third petition. The petitioners argued that the Attorney General owed them a duty of fairness which he failed to discharge.

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160. R.S.B.C. 1979, c. 219.

161. Id. s. 129.

The issue facing the court was to determine the proper place for this type of decision on the continuum of statutory decision-making powers. The Attorney General argued that his decision could best be characterized as a "broad policy-oriented decision" where, according to the Supreme Court in Coopers and Lybrand, the content of procedural fairness disappears into "nothingness".[162] He contended that the existence and extent of public policy aspects should determine a decision's place on the continuum.

Mr. Justice Taylor rejected this formulation as too narrow and adopted the test used in Re Rogers,[163] which asked whether the decision "may adversely affect the interests of any person." He noted that it was the interference with "rights" which first prompted the courts to intervene in administrative matters under the auspices of the rules of natural justice but that today a duty of fairness will be imposed where a decision may have an impact on a person's "legitimate interest". This interest can be less than a recognized legal right:[164]

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162. Surpa n. 158 at 550. This classification was taken from D. Mullan, "Fairness: The New Natural Justice" (1975) University of Toronto L. J. 280 at 300.

163. (1980) 23 B.C.L.R. 67.

164. Supra n. 159 at 551.

> While the adjoining landowner obviously never acquires a right to cancellation of an unused road allowance, I think it clear, for the purpose of finding an appropriate place in the "continuum" within which the doctrine of administrative fairness operates, that he has a very real "interest".

This aspect of the decision will be important when we review the licensee's ability to proceed to lease in the next section. In both cases the petitioner may only have the right to apply for a result and not the right to a given decision.

It is interesting to note that the court did not quash the Attorney General's decision on the first petition because there was nothing to show why his statement should not have been accepted at face value. The petitioners were not refused an opportunity to make a submission nor was it shown that the Attorney General considered irrelevant matters. The remaining two decisions were, however, quashed. The Court felt that it was not "fair" for the Attorney General to consider economic factors in relation to the second petition and the absence of reasons on the third petition, while not in itself unfair, meant that the court could not perceive of any "fair" basis on which his decision could have been made. Both of these grounds are interesting as they suggest that the court was doing more than reviewing the procedural aspects of the decision on the grounds of fairness and actually reviewing the merits of the Minister's decision.

The doctrine of fairness creates procedural requirements based on the common law. In the absence of express procedural provisions in the statute, and sometimes in addition to them, the duty dictates what steps must be taken before a person has been treated fairly in the eyes of the law. It is generally conceded that the doctrine creates only procedural duties but there are recent indications that the duty of fairness may be expanding into substantive requirements as well.

Professor Lucas argues that the Acro decision and the decision of the trial court in R. v. Industrial Coal and Minerals[165] shows that the courts are prepared to give substantive as well as procedural content to the concept of fairness.[166] He concludes, however, that decisions should not be decided on substantive grounds of fairness when they could equally be decided on accepted principles of abuse of discretion.

This subject has also received the careful attention of Professor David Mullan.[167] He argues that there is no need to

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165. [1979] 5 W.W.R. 102 revg [1977] 4 W.W.R. 35.

166. A.R. Lucas, supra n. 119 at 17 and 18.

167. David J. Mullan, "Natural Justice and Fairness - Substantive as well as Procedural Standards for the Review of Administrative Decision-Making" (1981-82) 27 McGill L. Rev. 250 at 297.

encourage a substantive doctrine of fairness because adequate judicial review is secured on current substantive grounds. He believes that such a substantive doctrine is not a necessary extension of the principle of procedural fairness. In his view, such an extension would either duplicate the function of abuse of discretion principles or go beyond the proper confines of judicial review because it lacks the deference normally given to the judgement of the decision-maker. He does, however, argue for a substantive head of review based on inconsistency.

In conclusion, statutory decision-makers must adhere to the procedural dictates of fairness or their decisions may be attacked. The content of the duty will vary according to its proper place on the continuum of statutory powers. Arguments based on procedural irregularity are used with ever increasing regularity and it remains a matter of speculation whether a substantive doctrine will eventually evolve.

2. The Scope of Judicial Review

The scope of the court's power to review discretionary decisions depends upon certain identified factors. They include:[168] 1) the wording of the discretionary power, 2) the subject matter to which it is related, 3) the character of the

168. De Smith, supra n. 140 at 281.

authority to which it is entrusted, 4) the purpose for which it is conferred, 5) the particular circumstances in which it has in fact been exercised, 6) the material available to the court, and 7) whether a court is of the opinion that judicial intervention would be in the public interest.

Discretionary powers under the Mines and Minerals Act are granted in so many varied ways that it may be difficult to construe the different formulations as meaning different things. In many cases the Minister 'may' exercise a given power,[169] in others the grant is wider: he "may in his discretion,"[170] exercise a power. Sometimes the exercise of a power depends on the "opinion of the Minister",[171] the Minister's determination,[172] the terms of a given section[173] or "if for any reason the Minister considers it necessary or advisable."[174] The phraseology used defines the scope of the discretionary power as

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169. This is the most common formulation. See ss. 5, 6, 8, 9, 10, 11, 24, 30(5), 31, 32(2)(3), 35(2), 36, 43.1(3), 49, 50, 51(3), 52(2), 54, 91, 92, 93(3), 96, 100(1.1) 102(1)(6), 103, 103.1.

170. ss. 20(1), 35(3).

171. ss. 58, 90(a).

172. s. 103(2).

173. See s. 102(1) where the Minister may allow the lease to continue in accordance with this section.

174. s. 35(1).

the intention of the legislature must be gleaned by comparing the width of various provisions. Provisions stating that the Minister "may in his discretion" come to a decision signify greater latitude than provisions where the Minister "may" simply exercise a power.[175] Certain discretionary powers under the Mines and Minerals Act may not, therefore, be as open to judicial review as others.

The scope of judicial review may also be narrowed by the very subject matter of dispositions under the Mines and Minerals Act. The Act empowers Ministers of the Crown to grant contractual or proprietary rights in provincially resources. Grantees are

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175. See Secretary of State v. Tameside [1977] A.C. 1014 as reprinted in J.M. Evans et al, supra n. 134 at 708:

> The section is framed in a "subjective" form - if the Secretary of State is satisfied." This form of section is quite well known, and at first sight might seem to exclude judicial review. Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not think that they go further than that. If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge.

therefore seeking a privilege, i.e. to have personal rights in public property. The case for wide powers of judicial review is not as strong as it is in cases where the government creates a prohibition and then establishes a licensing power. In those cases individuals are denied the right to do something which, but for the prohibition, they would have the right to do. This can be compared to the position of applicants under the Act who are seeking the right to do something they would otherwise have no right to do. This difference may increase a courts reluctance to interfere with discretionary powers under the Act.[176]

3. Discretionary Powers Under the Mines and Minerals Act

In this section I discuss the possible application of the principles presented in the previous sections to discretionary decisions taken under the Mines and Minerals Act. I deal with selected discretionary powers, which most directly affect the security of tenure of licensees and lessees. They concern the Minister's powers to (a) grant licences, (b) renew licences, (c) grant leases, (d) continue leases beyond their primary term, (e) impose production cutbacks under the Mines and Minerals Act, (f) terminate interests.

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176. See the Section on "Ministerial Responsibility" and "Are the Minister's Power's Regulatory?", at pp. 106 et seq.

There are other discretionary powers under the Mines and Minerals Act and other statutes which affect a grantee and their cumulative effect is to introduce uncertainty into the Crown's tenure regime. The advantages and disadvantages of discretionary decision-making powers, both from the viewpoints of the Crown in search of maximum flexibility and the grantees in search of security will be studied in the next section.

(a) The Minister's Power to Grant Licences

The Minister's discretionary power to award licences is theoretically open to review on jurisdictional and procedural grounds but the content of the Minister's legal duties may be very limited at this stage because of the contractual underpinnings of this type of decision.[177] The government should be free to decide when its resources are to be exploited. At this stage, prospective applicants have not spent significant funds so the courts may not find an interest worthy of protection by way of judicial review.

It is interesting to note that under s. 4(1) of the Regulations "a person is entitled to a licence where his offer for the licence is accepted by the Minister at a sale by public tender".

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177. Unless one is of the belief that because the Crown is the owner of these resources then it is not acting pursuant to regulatory powers.

There is, however, no duty on the Minister to accept any offer, even from the highest bidder.[178] There are no stated criteria on which the Minister must base his approval so restrictions and considerations would only flow from the general purposes of the Act. In the absence of an extraordinary case it is unlikely that the decision to grant or refuse a licence will be judicially reviewable because only rarely will compelling grounds be found.

(b) The Minister's Power to Renew Licences

The Minister's power to renew licences is limited to licences granted for two years in the plains area. The Regulations do not specifically authorize the renewal of four and five year licences so any renewal of those interests would legally take the form of a regrant. Under s. 6(3) the Minister "may" extend the term of a two year licence for an additional one year period, on the terms and conditions he prescribes.

Increasingly, licensees who have complied with the terms and conditions of their licences are denied renewals, regrants or the ability to proceed to lease because of informal and restrictive land use designations introduced into an area after the licence has been granted. In the usual sequence of events, exploratory rights are granted in a specific area, the company commences its

178. This is reinforced by s. 8 of the Act.

exploration program and the public becomes aware that the land will be developed. Public concern often results in political pressure to stop or curtail development. The Minister may use his discretion to refuse licence renewals, regrants or leases on the ground that government policy no longer favours development in the area.[179]

This may appear harsh to licensees after they have spent time and money on a location and have reported their findings to the government. Their activities create the expectation that they will be allowed to develop what they find. For administrative law purposes, this factual scenario raises the issue of whether land use possibilities are a relevant consideration when the Minister exercises powers conferred by the Mines and Minerals Act and Regulations. At first sight, it would seem that land use possibilities are an appropriate consideration when the Minister decides whether lands should be dedicated to petroleum or natural gas activities, but the Ontario decision in Re Multi-Malls Inc. v. Minister of Transportation and Communications[180] gives some contrary indications.

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179. If the land is formally withdrawn under statutory authority then the Minister's refusal is usually sanctioned by the relevant statute and this issue does not arise.

180. (1976) 61 D.L.R. (3d) 430; rev'd (1977) 73 D.L.R. (3d) 18.

In that case, the Minister of Transportation and Communications refused access and land use permits because the proposed development was in conflict with the Municipality's Official Plan. These plans are prepared under the Planning Act[181] but they are not the responsibility of the Ministry of Transportation and Communication. They are merely policy statements which are not legally binding. The trial judge held that the Minister had not been motivated by irrelevant consideration by basing his decision to refuse the permits on the land use designations contained in the Municipal Plan. In his view, the Minister was not only the head of a department, he was also a Minister of the Crown. This meant that he was not limited to the purposes and considerations consistent with his statutory powers under the Public Transportation and Highway Improvement Act,[182] but that he was free to consider any matter on which his advice might be sought by the Lieutenant Governor, including the municipal plan.

This decision was reversed on appeal. Mr. Justice Lacourciere noted that the Minister's discretion extended to three matters: 1) he "may issue permits"; 2) may impose "such terms and conditions as he considers proper"; and 3) he "may in his discretion cancel any such permit at anytime." The different wording

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181. R.S.O. 1970, c. 349.

182. R.S.O. 1970, c. 201 as am.

suggested that his discretion to issue permits was narrower than his other powers. The judge held that the Minister was acting as a persona designata and quashed his refusal because it was based on extraneous, irrelevant and collateral considerations. The purpose of the Act he administered was to generally control traffic and not to ensure proper land use planning.

An analogy can be drawn between this decision and the hypothetical licence renewal case suggested. Following the reasoning in Multi Mall, alternative land uses may not be a proper consideration because the Minister's powers under the Mines and Minerals Act are intended to serve the purposes of resource development and not land use planning. The analogy between the two cases may be weakened by the significant factual differences between them. In Multi-Mall, the plaintiffs owned the land and were merely seeking the permit required by new land use controls. In our hypothetical case, the Crown owns the land and licensees know the terms and conditions under which licences are granted. These differences may allow a court to distinguish Multi Malls if it is reluctant to review this type of decision.

Licensees are, however, owed a duty of procedural fairness by the Minister. The monies they expend gives them a "legitimate interest" within the test established in Acro Pace but even when a plaintiff can advance these jurisdictional arguments he may face practical problems trying to establish the motives, purpose or

considerations of the Minister. The failure of the Minister to give reasons for his decision will not ipso facto prevent or frustrate judicial review, although it may create evidentiary problems. In Padfield v. Minister of Agriculture[183] the House of Lords also remarked that the absence of reasons would not prevent judicial review.[184] In Acro Pace[185] the Minister's silence on the third petition was interpreted as evidence that he had no good reason for his decision. The inference from this finding is that the burden will be on a silent Minister to support and justify his decision. This suggests that the absence of reasons alone is perceived as unfair, despite dicta to the contrary in Acro.

A further evidentiary problem for the plaintiff is that when the Minister does make a statement, it may not be open to

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183. [1968] A.C. 997.

184. Reid thought that, in such a case, the Court would still be entitled to act if it appeared from all the circumstances that the effect of the refusal to refer the complaint was to frustrate the policy and objects of the Act (p. 1032). Lord Hodson was also of the view that absence of reasons should not be allowed to hamper review (p. 1049). Lord Pearce and Lord Upjohn were of the opinion that silence could be evidence from which the Court could infer that the minister had no good reason for his decision and this would constitute grounds for review (pp. 1053-54; 1061-62).

This synopsis of the case was taken from J. Evans et al, supra n. 134 at 604-5.

185. Supra, n. 159.

challenge. The court refused to go behind the Minister's statement in Acro Pace that the lands might be needed for future development. From the viewpoint of the petitioner, the efficacy of review depends upon the extent to which the courts are prepared and equipped to go behind a Minister's decision to ascertain what actually motivated the decision. If, as in Acro the court was not prepared to go behind the decision at all, a plaintiff's attempts to successfully plead the jurisdictional defects of improper motives, improper purpose and irrelevant considerations may be curtailed.

In conclusion, the prospects for judicial review of the Minister's decision to renew are narrow but the decision in Multi Malls may lend limited support to a plaintiff's claim. The scope of review under the Mines and Minerals Act may be narrower than in Multi Malls and a licensee may find it difficult establishing the Minister's true motives, especially if the Minister gives reasons for his decision which are consistent with the purposes of the Mines and Minerals Act.

(c) The Minister's Power to Grant Leases

The common belief in this area is that the Mines and Minerals Act gives the Minister the discretion to grant leases and that licensees are only entitled to apply for a lease. According to this view, the Minister is under no statutory duty to grant a lease and the licensee enjoys limited security of tenure. The

relevant provisions are sections 93 and 106 of the Act and section 13 of the Regulations. It is my contention that licensees have greater rights than commonly conceded.

The starting point is section 93 (1)(b) which establishes that a "person is entitled to a lease" when "he is the holder of a licence . . . and applies for a lease in accordance with the regulations".[186] This section establishes entitlement as the general rule. The reference to the regulations suggests that the regulations will provide procedures which must be followed before a licensee can obtain the lease, but not for the criteria for granting a lease. The Act does not say that a licensee is entitled to a lease if he qualifies in accordance with the regulations. The wording in section 93(1)(b) is much narrower.

The prima facie entitlement of section 93(1) is restricted by the Minister's power of review in section 93(3). This subsection carves an exception to the general rule contained in section 93(1) so it should be narrowly construed. Section 93(3) gives the

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186. Section 93 of the Mines and Minerals Act establishes three ways in which an individual may acquire a lease and all of them involve the discretion of the Minister. The first is where the Minister accepts an offer by public tender, the second is where a licensee applies for a lease and the third is where the Minister considers that the granting of the lease is warranted in the circumstances. The first and third will create the same issues posed by the Minister's power to grant or refuse a licence.

Minister the discretion to review lease applications and empowers him to confirm or refuse them. This discretion constitutes a political safeguard in the event circumstances intervene which render development undesirable. The presence of this discretion does not destroy the entitlement, it merely qualifies it. The Act gives the Minister the option to confirm or refuse the application, it does not say that a licensee has no right to a lease until his application is confirmed by the Minister. If this is what the legislature intended, it could easily have expressed its intention more clearly.

The confusion in this area is generated by section 13 of the Regulations. It states that a licensee who drills a "lease earning well", as defined in section 1(b), is "entitled to apply for a lease" on lands contained in the location of his licence. What happens if a licensee is refused a lease because he has not drilled a well or has not drilled a well which the Minister defines as a lease earning well? It is unlikely that the Minister's decision of what constitutes a "lease-earning well" will be subject to judicial review in light of the decision in R. v. Industrial Coal.[187]

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187. [1977] 4 W.W.R. 35 rev'd [1979] 5 W.W.R. 102 For a discussion of this case see the following section.

A licensee may argue that section 13 of the Regulations is ultra vires in so far as it detracts from the entitlement granted by section 93. It could be argued that the right to proceed to lease was qualified only by the Minister's review powers under section 93(3) and could not be limited by any substantive terms and conditions imposed by the Regulations. The requirement of a lease earning well is inconsistent with section 93(1)(b) of the Act because section 93 applies to a person who is the "holder of a licence", without differentiating between licensees who have drilled lease-earning wells and those who have not. In addition, section 13 states that the licensee is "entitled to apply" for a lease whereas, section 93 states that a person is "entitled to a lease". Section 13 is the subordinate enactment and must therefore yield to the governing provision in the Act. Therefore, all licensees would be entitled to a lease, regardless of whether they have drilled a lease earning well.

The argument that section 13 is inconsistent with section 93 and therefore ultra vires is based on the assumption that the content of section 13 was within the Lieutenant Governor in Council's power to make regulations. In light of the limits in section 106 of the Act, even this assumption is questionable and the licensee may attack the limitations in section 13 on this alternative ground. While section 106(1) gives the Lieutenant Governor in Council the right to make regulation, his power is limited to matters governing "licences". Arguably section 13

purports to govern "leases" because it establishes the criteria on which leases will be granted. Nor is the power to promulgate those regulations found in the specific headings in section 106(2).

Section 106(2)(c) suffers from the same defect as section 106(1) because this is a matter relating to leases and not licences and section 106(2)(d) authorizes regulations on how the locations for a lease may be selected and not on how the lessees may be selected. The licensee therefore has a strong argument that section 13 is beyond the jurisdiction of the Lieutenant Governor in Council both because it exceeds section 106 and because is inconsistent with section 93. One reason for rejecting this line of argument is that if section 13 of the Regulations were not enforced, a licensee could proceed to lease without drilling. I see no injustice in this, considering that a licensee has paid rentals during the currency of his licence and section 93 of the Act allows persons other than licensees to obtain leases without a similar drilling prerequisite.

This reading of the relevant section increases a licensee's security of tenure without destroying the integrity of the licence and the two tier tenure system. The licensee has the option of accepting a short term less expensive tenure for exploration purposes but can assume the heavier burdens of a lease when he feels able. Many investors would not wish to lock themselves into

a lengthy initial tenure or one which did not give them entitlement. The licence, as it presently stands, satisfies these concerns. The review power in section 93(3) constitutes the government's attempt to prevent absolute entitlement by allowing itself flexibility.

A licensee receives further protection because the Minister's decision to review under section 93(3) is subject to the jurisdictional and procedural requirements attaching to all discretionary powers. The Minister's power to review is worded as an exception to entitlement, so the scope of judicial review may be wider as his decision would constitute a deviation from the status quo.

Even if a licensee's "right" is qualified by the review powers of the Minister or is merely a "right" to apply for a lease it is sufficient to establish the "legitimate interest" required by the Acro Pace decision to create the duty of procedural fairness. The Minister's review decision under section 93(3) undoubtedly affects the rights of licensees, so he is subject to the dictates of procedural fairness.

The licensee who is refused a lease on the ground that he has not drilled a "lease-earning well" may attack the validity of that requirement in light of the regulation making powers of the Lieutenant Governor and the entitlement provision in the Act. If the application is reviewed by the Minister and refused he may

challenge the decision on jurisdictional and/or procedural grounds. In addition, the Minister normally gives reasons when he acts under the review power. This limits the possibility of using this power to withhold the designation of a "leasing earning well" when the Minister is motivated by considerations other than the licensee's exploration program. This factor emphasizes that the proper vehicle to prevent licensees from proceeding to lease should be the Minister's review power; it encourages openness and accountability in a political sense for what might be political decisions not to allow continued development.

(d) The Minister's Power to Continue Leases Beyond Their Primary Term

The lease extensions authorized under sections 99 et seq confer significant discretionary powers on the Minister. He must be satisfied that there is diligent and continuous drilling under section 100 and he may allow the lease to continue in unproven areas. Section 99 is not discretionary on its face, but it incorporates discretionary powers by the definition of "a producing well": which is a well that is, in the opinion of the Minister, capable of producing petroleum or natural gas in paying quantities. It is important for a lessee to establish the existence of a producing well because it is the easiest and most common way to extend a lease beyond its primary term.

This is one of the few sections of the Act which has received judicial attention. In R. v. Industrial Coal[188] the primary term of the plaintiff's lease was to expire on October 26, 1975. There was an abandoned well which had reverted to the Crown on the leased lands. The plaintiff wrote the director of minerals on August 31, 1975 and contended that its lease should be continued because the abandoned well was capable of production. The supervisor of leases responded on September 26, but did not address himself to this issue. The plaintiff wrote again but it was not until October 17th that he was told that the abandoned well would not qualify to extend the lease and that it was required to drill a well before the lease would be extended. The plaintiff claimed that it had been treated unfairly because it made inquiries a full two months before the expiration date and was only given two weeks in which to drill the necessary well.

The trial judge held that whether an abandoned well was capable of production in paying quantities was a matter for the discretion of the Minister. He went on to say that production capacity is the only relevant consideration when the Minister determines whether a lease should be continued. If the Minister addresses his mind to other considerations, the court may review his decision. This judicial attitude suggests that a lessee's

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188. Id.

rights could not be curtailed for any reason other than his failure to produce. Under this reasoning political considerations and changes in government policy may constitute irrelevant considerations.

The trial judge's decision predated and presaged Nicholson. He noted the limited recognition Canadian courts had given to the notion of procedural fairness and held that the Minister failed to fulfil his duty of fairness because of his failure to give the lessee reasonable notice of the department's requirements and the opportunity to satisfy them. This judgment took the form of a declaration that the lease was valid and subsisting and he gave the lessee two months to drill the required well. Two months was approximately the amount of time he would have had to drill the well if the Minister had answered his letter properly and promptly.

The Alberta Court of Appeal reversed this decision in a very short judgment. They held that the Minister had addressed his mind to the appropriate question and that his decision was final and not open to review but they did not squarely answer the procedural fairness argument. This case was decided one year before the Supreme Court gave its decision in Nicholson so it may be proper to read down this decision to mean that as long as the Minister is acting within his jurisdiction, the court will not ask whether it would have come to the same conclusion. In light of

Nicholson, however, if he acts outside his jurisdiction, even by breaking the requirements of procedural fairness, then the decision will be reviewable. The suggestion by the Court of Appeal in Industrial Coal that the Minister's power was unfettered is probably altered by the impact of the Nicholson decision.

(e) The Minister's Power to Order Production Cutbacks

Section 116 gives the Lieutenant Governor in Council the power to make regulations fixing the maximum amount of petroleum which may be produced under Crown agreements, if he considers that it is in the public interest to do so. This section was originally enacted as Bill 50 on May 22, 1980 to strengthen the province's bargaining position in the federal/provincial negotiations over oil pricing. The announcement of the Federal National Energy Policy was countered by Premier Lougheed's fifteen percent petroleum production cutback. The regulation required by section 116 was promulgated on November 7, 1980.[189] To show its support for

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189. Mines and Minerals Act, Alta. Reg. 325/80. It reads:

> 1. The maximum amount of petroleum that may be produced under Crown agreements is fixed at
>
> (a) 3 470 333 cubic metres for each of the months of March, April and May, 1981,
>
> (b) 3 174 760 cubic metres for each of the months of June, July and August, 1981, and
>
> (c) 2 879 187 cubic metres for the month of September, 1981 and for each subsequent month.

the government's tactic, the legislature voted on and approved the cutbacks by a 58 to 1 majority, although this was not legally necessary.[190] The cutbacks were introduced ninety days later, but applied only to wells on Crown lands. The government could have introduced the cutbacks under the Oil and Gas Conservation Act[191] and applied them to all wells in the province. That would have squarely raised issues of expropriation as the cutback would only operate as legislation in relation to freeholders but Crown lessees would nevertheless have been bound as a matter of contract through the compliance with laws provision. One possible reason that the government proceeded as it did was to avoid issues

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2. If, at any time after this regulation if filed under The Regulations Act, the Minister of Energy and Natural Resources receives from the Alberta Petroleum Marketing Commission advice that the Government of Canada or its agencies or anyone acting on its behalf is unable by reason of a shortage of supply to purchase in the international oil market sufficient oil to meet Canadian requirements.

   (a) the Minister shall forthwith make a public announcement as to receipt of the advice and

   (b) upon the making of the public announcement, this regulation shall be deemed to be repealed.

190. Section 116 gives the power to the Lieutenant Governor in Council alone to make the decision. The debate over the introduction of its equivalent section centred on the need for a more open forum for such an important issue. The government undertook to present the issue to the House for discussion rather than removing the decision into the channels of cabinet secrecy.

191. Oil and Gas Conservation Act, R.S.A. 1980, c. O-5.

of expropriation and in order to rely on its ownership powers in the event of any constitutional challenge to Bill 50.

The reviewability of an order in council was questioned in Irving Oil Ltd. v. National Harbours Board.[192] Irving Oil Ltd. built a deep water terminal facility outside the port of St. John. An order in council was promulgated which extended the boundaries of the port to include Irving's new facility. This gave the National Harbour Authority the power to levy dues against the company for the use of the port. The company attacked the order in council on the ground that it was passed for the improper motive of collecting harbour dues without offering any services in return. In addition, Irving argued that the order in council establishing the harbour dues did not apply to them.

The Supreme Court of Canada decided that the validity of this order in council could not be impugned on the basis of improper motives or bad faith, but it did not rule out the possibility of an attack on these grounds in an appropriate case. Mr. Justice Dickson stated:[193]

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192. (1983) 46 N.R. 91. It should be noted, however, that the reviewability of orders in council and other "legislative" functions is not free from doubt. This decision suggests they are reviewable but for a contrary position see R. v. Beaver, [1982] 136 D.L.R. (3d) 144.

193. Id. at 95.

> The mere fact that a statutory power is vested in the Governor in Council does not mean that it is beyond judicial review. I have no doubt as to the right of the courts to act in the event that statutorily prescribed conditions have not been met and where there is therefore a fatal jurisdictional defect. Law and jurisdiction are within the ambit of judicial control and the courts are entitled to see that statutory procedures have been properly complied with. Decisions made by the Governor in Council in matters of public convenience and general policy are final and not reviewable in legal proceedings. Although, as I have indicated, the possibility of striking down an order-in-council on jurisdictional or other compelling grounds remains open, it would take an egregious case to warrant such action. This is not such a case. (references deleted)

After stating that the government's motives were beyond review, he nevertheless canvassed the factors underlying the decision to extend the port.[194] He recognized the government's

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194. In this case there was a "Memorandum to the Minister" and letters between the parties which contained evidence of the government's motives. Often, the lack of available evidence reduces the possibility of a challenge on the grounds of improper motives or irrelevant considerations. Mr. Justice Dickson noted at 96:

> I agree with the Court of Appeal that the government's reasons for expanding the harbour are in

desire to increase harbour revenues and to establish centralized control over all harbour activities under the National Harbour Board. He justified this review of motive in the following terms:[195]

> I have referred to these several pieces of evidence, not for the purpose of canvassing the considerations which may have motivated the Governor in Council in passing the order-in-council, but to show that the issue of harbour extension was one of economic policy and politics and not one of jurisdiction or jurisprudence.

It is also interesting to note that there was communication between the parties which gave Irving Oil the opportunity to be heard. The court upheld the order in council.

Courts will review orders in council but because they are a legislative function, with political undertones, the scope of judicial review is largely limited to asking whether the regulation is authorized by the statute. The order in council

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> the end unknown. Governments do not publish reasons for their decisions; governments may be moved by any number of political, economic, social or partisan considerations.

195. Id., at 99.

authorizing production cutbacks appears to fall within section 116 so it is unlikely that a grantee could successfully challenge a cutback order on this ground. The parallels between the order in council in Irving Oil and the one authorized under section 116 of the Mines and Minerals Act suggests that a court would decline to review a cutback order on the grounds of improper motive, unless one could establish an "egregious case". It is arguable that the production cutbacks were motivated by the government's desire to enhance its bargaining position in the federal/provincial dispute over oil pricing policy. A secondary motive could have been to conserve provincially owned resources at a time when they commanded a reduced, and perhaps inadequate, market price. According to the ratio in Irving Oil these would be policy matters beyond the scope of judicial review.

The wording of section 116 contributes to this apparent immunity from review because it gives the Lieutenant Governor in Council the subjective power to determine when a regulation is required. It states "The Lieutenant Governor in Council may, if he considers it in the public interest to do so, make regulations . . . " This is much wider than a power to make regulations which are "necessary" because courts will sometimes take an objective view of what is necessary and review on that basis.[196] The

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196. J. Evans et al, supra n. 134 at 602.

subjectivity of section 116 further insulates this particular power from judicial review.

In light of Irving Oil and the wording of s. 116 it appears that the scope of review of the order-in-council is limited to asking whether the Lieutenant Governor in Council satisfied a condition precedent to his jurisdiction and/or whether the facts establish an "egregious case".

(f) Termination of An Interest

The Minister has different powers to terminate interests and their effect on security of tenure varies according to whether the cancellation is for cause or is done in the name of the public interest.[197] When agreements are cancelled for cause, security of tenure should not be affected because the Minister is merely enforcing the terms of the agreement.[198] The Act does not give the Minister the power to determine when a breach has occurred so the court, as arbiter, will impose an objective standard.

Cancellations in the public interest under section 10(1)(c) effect security of tenure, even though the Act provides for

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197. See ss. 8, 10(1)(c), 49, 96, 50, 104, 18 and 39.

198. R.H. Bartlett, "The Right to Mine and the Extent of Ministerial Discretion", paper presented at the Mining Law Institute, Saskatoon, 1983 at 34.

compensation, because they introduce uncertainty. This cancellation power is discretionary and therefore reviewable on traditional grounds but the reference to "public interest" imports political considerations which may reduce the scope of judicial review. Courts have traditionally failed to go behind the Minister's statement that he was satisfied that the decision was required in the public interest.[199]

D. Advantages and Disadvantages of Discretionary Powers

1. The Government's Perspective

The Alberta government consciously chooses discretionary powers to retain flexibility in the areas where it is not secured by the compliance with laws provision. From the government's perspective there are two major defects with the compliance clause as a means of securing flexibility vis a vis its grantees: it requires a statutory or regulatory amendment and it is better suited to deal with general rather than particular matters. Discretionary powers can be used quickly and easily to effect changes brought on by shifts in governmental policy without formal amendments. Secondly, discretionary powers can be exercised according to the dictates of particular circumstances and can respond to individual needs.

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199. De Smith, supra n. 140 at 295.

It is hard to find major disadvantages with discretionary powers from the perspective of a government seeking maximum flexibility. Some decision-makers may be uncomfortable with the increased personalization and accountability attaching to discretionary powers because they cannot point to mandatory statutory provisions which justify their decisions. Others may argue that the discretionary powers of the Mines and Minerals Act do not go far enough. A potential drawback is that the uncertainty introduced by wide discretionary powers reduces the amount applicants are prepared to bid for their interests, [200] but it seems likely that governments will continue to reserve these wide discretionary decision-making powers on an ever increasing scale.

2. The Interest Holder's Perspective

It is equally hard to define concrete advantages which discretionary powers bestow on interest holders. These powers allow administrators to respond to the needs of interest holders in individual matters but this end could also be achieved with less discretionary powers than currently exist. The disadvantages of discretion, from the interest holder's perspective, are the uncertainty it introduces and how it prevents the vesting of legally enforceable rights. The widespread presence of

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200. A.R. Tussing, "An Economic Overview of Resource Disposition Systems", paper presented at a conference on the Public Disposition of Natural Resources, Banff, April, 1983 at 16.

discretionary powers means that interest holders are generally limited to their administrative remedies. On the positive side these remedies help restrict the arbitrariness of discretionary decisions and the presence of legal remedies bolsters security of tenure.

On the negative side, however, administrative remedies suffer two drawbacks which reduce their contribution to security of tenure. The first is the availability of the remedy. Prerogative writs are discretionary remedies so an interest holder may be denied a remedy for reasons other than the merits of his case.[201] Secondly, even if a remedy is available, it will often be of limited efficacy as the interest holder rarely has the right to demand a result by way of mandamus. The scope of review is limited to jurisdictional grounds and the courts cannot generally substitute their decision for that of the Minister. In most cases the Minister must still exercise his discretion, even if his initial decision was quashed on jurisdictional grounds. It is hard to escape the feeling that administrative remedies merely give the Minister another chance to justify his initial decision. This feeling may create a reluctance to pursue administrative

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201. D.P. Jones, "Discretionary Refusal of Judicial Review in Administrative Law" (1981) 19 Alta. L. Rev. 483 at 485.

remedies in cases where the interest holder seeks a reversal of the Minister's decision rather than a delay in its implementation.

The efficacy of administrative remedies is further limited by the fact that an interest holder may only attack the actual decision and not the power under which it is made. This may create timing difficulties for the interest holder who wants to review the Minister's considerations or procedures before he reaches his decision.[202] The problems associated with statutory discretion and administrative remedies has convinced one writer that the only effective way to control on discretionary powers is to impose statutory limitations upon them.[203]

An interest holder who has successfully invoked his administrative remedies may find that the effect of the court's decision is altered or reversed if the government chooses to enact retroactive legislation.[204] This added element of risk reduces his security of tenure. The true value of an interest holder's administrative remedies lies in their ability to make the Minister

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202. A.R. Thompson, supra n. 69 at 16. See Island Protection Society v. The Minister of Forests [1979] 4 W.W.R. 1.

203. J.E. Kersell, "Statutory and Judicial Control of Administrative Behavior" (1976) 19 Can. Pub. Admin. 295.

204. This was the fate of the successful plaintiff in the Heppner case. See Schachter, supra n. 136 at 393.

politically accountability for his decisions[205] and to influence decisions.[206] Their limitations, however, suggest that the flexibility retained through discretionary powers is not counter-balanced by the interest holders' administrative remedies. The uncertainty created by discretion and the limited scope and effect of judicial review reduce the security of tenure which the Mines and Minerals Act offers to interest holders.

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205. J. Evans et al supra n. 134 at 607.

206. A.R. Lucas, supra n. 119 at 1.

CHAPTER V

GOVERNMENT POWERS OF EXPROPRIATION

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CHAPTER V

GOVERNMENT POWERS OF EXPROPRIATION

Introduction

This Chapter outlines the legal and political consequences of subsequent legislation which alters or expropriates vested interests. Legislative sovereignty is the government's most potent response to changed circumstances. It provides the greatest flexibility but it also poses the greatest threat to an interest holder's security of tenure. The extent of that threat depends on how often this power is used and whether it is invoked with or without compensation. It is the ultimate mechanism used to retain flexibility, because the Crown need not resort to confiscatory legislation if desired changes can be made through contractual terms or statutory discretion. The effect of confiscatory legislation on acquired rights depends upon whether any "rights" were initially granted by the government and this turns on the legal nature of the interests which were canvassed in Chapter II.

The use of legislation to alter vested rights raises many legal issues. It is trite law that the Crown may expropriate private rights, even without compensation, if it does so expressly, but in most cases there is no express provision either granting or refusing compensation. Interest holders are keenly interested in how far the manner and form presumptions concerning retroactive legislation protect their rights. They want to know

what level of interference amounts to an expropriation and when they are entitled to compensation for their losses. The greatest uncertainties exist when asking what amounts to an expropriation and when compensation is payable. Compensation may be based upon the terms of the confiscatory statute, provincial expropriation law or perhaps the common law.

The Crown's legislative attempts to retain flexibility will affect a grantees' security of tenure. To determine whether the requisite level of security is present, the grantee will examine the contractual provisions and speculate on the likelihood and extent of midstream variations. The prospect of expropriation, especially after work has been commenced or bonuses have been paid, may discourage a potential grantee from entering into resource agreements or may alter the amount he is prepared to pay for resource rights. Due to the sovereignty of the Crown's legislative capacity, the grantee cannot enjoy an absolute security of tenure, but the risks of interference with tenure are mitigated if the grantee's rights are protected by compensation principles. The legal right to compensation in the event of an expropriation will be a major factor in determining the grantee's level of security and in determining the price of the Crown's flexibility. There is a proportional relationship between flexibility and security of tenure; the fewer ways in which the Crown can alter its grants, the greater the grantees' security of

tenure. Similarly, the greater the legal protection given to vested rights, then the higher the costs of legislative freedom.

Although the Crown's strict legal rights include the unlimited power to vary rights by legislation, even without compensation, for legal and political reasons, its legislative capacity is invoked only when it is clearly required. Politically, the Crown must judge the effect of legislative alterations on the province's economic, investment, and political climate. To ensure a stable energy supply, the Crown must strike a proper balance between its own need and the grantees' requirement of security of tenure. It can only do so by supplying fair contractual terms and refraining from the capricious, extravagant, or frequent use of its legislative sovereignty. These political considerations may prevent the Crown from exercising its strict legal rights.

The discussion in this chapter examines subsequent amendments as if they operated solely as matters of legislation because the effects of the government's contractual variation devices have been explained separately in Chapter Three. Separating the government's powers in this way also emphasizes the obligations that may arise in the absence of contractual terms promoting government flexibility.

A. Government Policy on Compensation

Government policy on compensation for expropriated resource rights is not clear. When freehold land is taken for a project such as public highway, government policy clearly provides compensation. When resource rights are altered or confiscated its policy is imprecise because the Crown's legal obligation to pay compensation is ambiguous. It is often questionable whether the legislation amounts to an expropriation and the Crown's legal obligation to pay compensation has not been judicially defined with any precision. It is sometimes argued that provincial ownership of natural resources reduces the obligation to pay compensation which might arise if the Crown expropriated freehold rights. This argument is based partly upon the legal nature of the interests granted by the Crown, partly on the effect of the confiscatory enactment and partly on the Crown's perceived absence of a moral obligation to provide compensation.

If resource interests are viewed as statutory licences and/or if interest holders merely possess a statutory status, then the Crown does not grant the contractual or proprietary rights necessary for interest holders to claim that their "property" has been expropriated.[207] Even if resource interests grant contractual

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207. Interest holders must first establish a vesting of contractual or proprietary rights. For a discussion of Alberta, federal, and Newfoundland petroleum and natural gas

or proprietary rights, not every alteration to vested rights amounts to an expropriation in law. A further argument questions the Crown's moral obligation to provide compensation because the Crown, as owner, should be free to administer provincial resources for the public benefit. It is argued that interest holders should have no claim for compensation because all future profits from the resources belong to the public.[208]

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interests see R. Harrison, supra, note 10, and for a general study see T. Daintith, ed., The Legal Character of Petroleum Licences: A Comparative Study 1981.

208. An example of this reasoning is found in the following excerpt taken from: British Columbia. Environment and Land Use Committee Secretariat. Environmental and Social Impact Compensation/Mitigation Guidelines, Victoria, 1980 at 15. This comment is meant to be of general application and would therefore equally apply to an approved project.

> Under no circumstances should compensation in respect of impacts on public resources* be directed to private sector or Crown corporations if a potential development is denied because of environmental or social resource constraints. This notion of reverse compensation (as has been suggested by some developers) ignores the fact that it is government which owns the public resources and therefore it is government which retains the right to use or not use them as it sees fit. Certainly, precluding a particular development entails a real social cost and the benefits of whatever precluded the project should exceed those social costs. However, the government need not compensate the potential developer because it is the government, not the developer, who is the owner and who has the right to allocate the use of the environmental or public resource.
>
> * If the resource were privately-owned and government, by legislation, precluded the development of the resource by the private owner, then compensation probably would have to be paid.

When governments are faced with a significant change of circumstances they must address two political questions: 1) whether or not retroactive legislation should be used to realign government policy with the new circumstances; and 2) if so, whether or not compensation should be paid to interest holders who are affected by the retroactive legislation. If the government decides to enact retroactive legislation it has three options on the second question: 1) it can expressly provide for compensation; 2) it can say nothing on the issue of compensation; or 3) it can expressly abrogate rights to compensation. Each of these options has a different effect on the security of tenure enjoyed by those grantees whose rights are altered by the legislation.

The first option entails the gravest immediate financial consequences for the government but its political consequences are limited as interest holders are compensated for the abrogation of their property rights. This option promotes the interest holder's security of tenure, thus fostering a stable investment climate.

The second option is an ambiguous statement which has the effect of transferring the power to decide the compensation issue to the judiciary. Interest holders seeking compensation must base their claims on the terms of the provincial or federal Expropriation Act, or they must argue that a common law right to compensation exists. This option is used regularly and it gives rise to the greatest legal uncertainty as it is unclear to what

extent and in what circumstances interest holders have legal rights to compensation.

Under the third option, the Crown eliminates any compensatory obligations but runs the risk of destroying security of tenure. This option will only be used in those cases where its perceived benefits outweigh its political costs. These three options are not necessarily mutally exclusive: thus, in the same enactment, the Crown can expressly provide compensation for one head of damage, expressly deny compensation for another, and leave the issue unresolved for yet another.

B. Parliamentary Sovereignty

It is recognized law that a provincial legislature, acting within its jurisdictional competence, is sovereign. The supremacy of our parliamentary institutions has been succinctly outlined by Riddel, J. in Florence Mining Co. Ltd. v. Cobalt Lake Co. Ltd.[209]

> "In short, the Legislature within its jurisdiction can do everything that is not naturally impossible, and is restrained by no rule human or divine. If it be that the plaintiffs acquired any rights, which I am far from

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209. (1909) 18 O.L.R. 275 at 279.

> finding, the Legislature had the power to take them away. The prohibition, "Thou shalt not steal", has no legal force upon the sovereign body. And there would be no necessity for compensation to be given. We have no such restriction upon the power of the Legislature as is found in some States."

This supremacy is, however, subject to certain limitations. First, judicial presumptions have led to manner and form requirements in matters of retroactive legislation and expropriation. Second, the province's power to expropriate property must be exercised within the confines of the Canada Act, 1982. Expropriations must be ancillary to a constitutionally valid exercise of power so the province must establish a sufficient nexus between the confiscation and the goal of the provincial legislation.[210]

C. Manner and Form Presumptions

Presumptions against retroactive legislation and expropriation without compensation are at the base of the acquired rights argument used by interest holders when their rights have been altered by subsequent legislation. Their argument can be stated in the following way: Our rights vested according to the terms of the statute in force at the time of the grant. Any

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210. Andre Lajoie, Expropriation et federalisme en Canada (1972) 77.

subsequent changes cannot apply to us as legislation generally operates prospectively. If it is intended to apply to us then it must do so expressly because it is retroactive legislation, and in that case, because it alters our acquired rights, there has been an expropriation. Whatever is taken by the terms of the confiscatory enactment is subject to the presumption that property is not to be expropriated without proper compensation.

This argument does not take into account the government's contractual right to vary reserved by the compliance with laws provision and/or the variable royalty clause. If however, the government's contractual variation powers were challenged successfully or if the change affected the terms of a licence companies would use this argument to claim compensation for their losses.

The judicial presumption against retroactive legislation results from the principle that statutes generally operate prospectively.[211] Statutes which retroactively alter vested rights are therefore the exception. The case of Spooner Oils Ltd. v. Turner Valley Gas Conservation Board[212] provides an excellent example of how strictly the courts construe attempts at retroactive legislation.

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211. G. Challies, The Law of Expropriation (1963) 3.

212. Supra n. 12.

In holding that a subsequent regulatory amendment did not affect rights under existing leases Duff, C.J.C. stated:[213]

> " . . . The appropriate rule of construction has been formulated and applied many times. A legislative enactment is not to be read as prejudicially affecting accrued rights, or an existing status unless the language in which it is expressed requires such a construction. The rule is described by Coke as a law of Parliament meaning, no doubt, that it is a rule based on the practice of Parliament; the underlying assumption being that, when Parliament intends prejudicially to affect such rights or such a status, it declared its intention expressly, unless, at all events, that intention is plainly manifested by unavoidable inference." (references deleted)

The government's intention to affect acquired interests must be clearly expressed and even the clearest expression will receive a strict and narrow construction.

Once a court recognizes that retroactive or confiscatory legislation is in fact intended, the presumption against expropriation without compensation arises. It is based upon the rule of construction that the legislature does not intend to make any

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213. Id., at 552.

substantial alteration in the law beyond what it actually declares, either by way of express terms or clear implication.

These requirements impose strictly manner and form restrictions; there are no substantive rules which limits the government's power to expropriate property or to do so without compensation.[214] As a result, the legislature can enact both retroactive and expropriatory legislation if it does so expressly because presumptions can be overridden by express declarations of legislative intention. The existence of this right means that the presumptions are of mainly political importance, requiring that political consequences must be acknowledged and faced. The requirement of an express legislative pronouncement opens government action to criticism and debate. As a corollary, when legislation can be classified as confiscatory the dispossessed interest holder enjoys certain tactical and political benefits:[215]

> "But like any other contracting party whose rights are retroactively affected by legislation the lessee would have the benefit of a political climate which views retroactive

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214. See Town of Milk River v. Registrar of South Alberta Land Registration District and Madge (1978) 10 A.R. 6 at 10 where the court says that expropriation without compensation is within provincial powers.

215. A.R. Thompson, supra n. 10 at 308.

> legislation as confiscatory, to be resorted to only in extreme cases, and of legal rules, which require retroactive legislation to be given a strict construction and to carry with it an implied right to compensation should there be a deprivation of property."

D. Constitutional Protection For Property Rights

In Canada, there is no constitutional guarantee of property similar to the fifth and fourteenth amendments in the United States Constitution.[216] The Canadian Charter of Rights and Freedoms does not extend direct constitutional protection to property rights, although recent indications suggest that the debate on this issue is not yet over. If property rights are given constitutional protection the government will still retain its sovereign power to expropriate but it will be legally obliged to provide compensation. The two issues of major concern to holders of interests under the Mines and Minerals Act are what government interference amounts to an expropriation and on what basis can they claim compensation. Entrenching property rights would provide the basis for a compensation claim but the legal definition of what constitutes an expropriation would not be any more settled than it is now. A constitutional amendment would,

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216. The Fifth Amendment declares that private property shall not be taken for public use without just compensation and the Fourteenth Amendment prohibits a State from depriving a citizen of his property without due process of law.

however, go a long way to protect interest holders by giving them a recognized right to compensation.[217]

The Canadian Charter of Rights and Freedoms gives some protection to property rights in a rather circuitous fashion. Section 26 of the Charter states that "the guarantees in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada". One of the effects of this section is to preserve any rights given by the Canadian Bill of Rights to the extent which they are not duplicated in the Charter.[218] The Bill of Rights, in sections 1(a) and 4, gives limited protection to property rights by a due process clause. These provisions continue to apply under Section 26 of the Charter because they are not duplicated in it.

Section 26 also preserves rights and freedoms embodied in provincial enactments which are not duplicated in the Charter. In

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217. Discussions on the principles underlying expropriations usually include a reference to the public good or the social purpose of the legislation. There is generally some suggestion that interference with private property rights is only justifiable when there is an overiding public interest. The question is who should pay for government measures which enacted for the public welfare: the public or individuals. Entrenching property rights in the Charter would arguably help restrict the capracious exercise of government powers.

218. P. Hogg, Canada Act 1982 Annotated (1982) 70.

Alberta's Bill of Rights[219] section 1(a) grants the right to the enjoyment of property and the right not to be deprived thereof except by the due process of law. Individuals receive only limited protection from these sections in the Canadian and Alberta Bill of Rights as the Charter only preserves these rights, it does not incorporate them into the Charter. They do not become "entrenched" into the Charter and are therefore subject to repeal by a simple majority of the legislative body which enacted them and the remedial provisions of the Charter are not available to interest holders claiming under either the Canadian or Alberta Bill of Rights. [220] The obligation of due process nevertheless continues to bind the federal and provincial governments.

The content of the due process clause has received surprisingly little judicial attention. There are no reported decisions under the Alberta Bill of Rights[221] and only one decision under the Canadian Bill of Rights. In National Capital Commission v.

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219. S.A. 1972, c. 1.

220. P. Hogg, supra n. 218 at 70.

221. In the Alberta decision of Heppner v. The Minister of the Environment et al (1977) 6 A.R. 154, Heppner argued that the order-in-council establishing a restricted development area was contrary to the due process clause in section 1(a) of the Alberta Bill of Rights. The Alberta Court of Appeal did not have to address this argument because it invalidated the order-in-council on jurisdictional grounds.

Lapointe et al[222] the defendant argued that the expropriation of her freehold lands was contrary to the Canadian Bill of Rights, because the old federal Expropriation Act[223] allowed the government to expropriate without giving notice and without giving her the opportunity to contest the acquisition. She claimed that the absence of these procedural protections violated the due process clause.

The Federal Court rejected her contention and gave an extremely narrow ambit to the concept of due process. Although Mr. Justice Noel noted that certain powers under the Act were "arbitrary", he held that they did not contravene the Bill of Rights because they were statutory powers granted under validly enacted legislation. In his view, "due process" was nothing more than compliance with the laws then in force. There was no higher duty, even though the Expropriation Act did not state that it applied notwithstanding the Bill of Rights.[224]

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222. (1972) 29 D.L.R.(3d) 376. In a recent unreported Alberta decision, counsel argued that the expropriation of the plaintiff's property offended Section 8 of the Charter in that it was an unlawful "seizure". The Court of Appeal held that the protection of Section 8 did not extend to the taking of real property by expropriation. See Becker v. The Queen, unreported, June 6, 1983, J. A. Lieberman of Edmonton, C.A. 16560 (Alta C.A.).

223. Expropriation Act, R.S.C. 1952, c. 106 now R.S.C. 1970, c. E-19 as am.

224. For a discussion of the American approach to "due process"

On the basis of this decision, it appears that arguments founded on the Canadian Bill of Rights and the Alberta Bill of Rights will be of limited utility in protecting interest holders under the Mines and Minerals Act from confiscatory legislative amendments. As long as confiscatory amendments or decisions are within the terms of the empowering statute then the dictates of due process will have been met, regardless of the arbitrariness of the statutory provision or administrative decision.[225]

E. Remedies for Expropriation

An interest holder who believes his rights have been expropriated by a legislative amendment must base his right to compensation on either the common law, the Expropriation Act or the statute which authorized the expropriation.[226] If the last mentioned statute exhaustively determines what compensation is available, then it is the only legally relevant source to determine the interest holders' rights. Similarly, if that statute expressly abrogates compensation rights the interest holder will

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see L. H. Tribe, American Constitutional Law (1978) 427 et seq.

225. Section 4 of the Alberta Bill of Rights requires that notice must be given to the Attorney General when a claim is made that a law of Alberta abrogates, abridges or infringes the Bill.

226. If expropriations result from the lawful exercise of government powers, an interest holder has no private law remedies against the government.

however, go a long way to protect interest holders by giving them a recognized right to compensation.[217]

The Canadian Charter of Rights and Freedoms gives some protection to property rights in a rather circuitous fashion. Section 26 of the Charter states that "the guarantees in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada". One of the effects of this section is to preserve any rights given by the Canadian Bill of Rights to the extent which they are not duplicated in the Charter.[218] The Bill of Rights, in sections 1(a) and 4, gives limited protection to property rights by a due process clause. These provisions continue to apply under Section 26 of the Charter because they are not duplicated in it.

Section 26 also preserves rights and freedoms embodied in provincial enactments which are not duplicated in the Charter. In

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217. Discussions on the principles underlying expropriations usually include a reference to the public good or the social purpose of the legislation. There is generally some suggestion that interference with private property rights is only justifiable when there is an overiding public interest. The question is who should pay for government measures which enacted for the public welfare: the public or individuals. Entrenching property rights in the Charter would arguably help restrict the capracious exercise of government powers.

218. P. Hogg, Canada Act 1982 Annotated (1982) 70.

Alberta's Bill of Rights[219] section 1(a) grants the right to the enjoyment of property and the right not to be deprived thereof except by the due process of law. Individuals receive only limited protection from these sections in the Canadian and Alberta Bill of Rights as the Charter only preserves these rights, it does not incorporate them into the Charter. They do not become "entrenched" into the Charter and are therefore subject to repeal by a simple majority of the legislative body which enacted them and the remedial provisions of the Charter are not available to interest holders claiming under either the Canadian or Alberta Bill of Rights.[220] The obligation of due process nevertheless continues to bind the federal and provincial governments.

The content of the due process clause has received surprisingly little judicial attention. There are no reported decisions under the Alberta Bill of Rights[221] and only one decision under the Canadian Bill of Rights. In National Capital Commission v.

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219. S.A. 1972, c. 1.

220. P. Hogg, supra n. 218 at 70.

221. In the Alberta decision of Heppner v. The Minister of the Environment et al (1977) 6 A.R. 154, Heppner argued that the order-in-council establishing a restricted development area was contrary to the due process clause in section 1(a) of the Alberta Bill of Rights. The Alberta Court of Appeal did not have to address this argument because it invalidated the order-in-council on jurisdictional grounds.

have no claim. The position is, however, not as clear when the expropriating statute makes no express reference to compensation or when its provisions are not intended to be exhaustive. In that case, an interest holder must base his claim either on a common law right to compensation or on the terms of the Alberta Expropriation Act.

1. Common Law Right to Compensation

There is no clear common law right to compensation. The main issue in this area is whether the principle against expropriation without compensation is merely a rule of construction or whether it confers a substantive right to compensation. If the principle is one of construction, an interest holder must prove that he has a statutory right to compensation. If the principle is substantive, the interpretation of the statute is not as important because the interest holder would have a common law right to compensation, enforceable by an ordinary judicial action. In either case, however, any right to compensation could be expressly denied by statute.

The confusion in this area is exacerbated by the judicial tendency to refer to an "implied right to compensation", without outlining whether it is one of construction or one of law.[227]

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227. A.R. Thompson, supra n. 10 at 284.

The existence of a substantive common law right to compensation will depend upon the interpretation subsequent courts give to the Supreme Court's decision in Manitoba Fisheries v. The Queen.[228] Before this decision, the rule against expropriation without compensation was thought to be one of construction only, so it could not form the basis of a substantive claim. Support for this proposition can be found in the following judicial comments:

> "The recognized rule for the construction of statutes is that, unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation."[229]

and

> "The appropriate rule of construction has been formulated and applied many times. A legislative enactment is not to be read as prejudicially affecting accrued rights, or "existing

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228. (1978) 88 D.L.R. (3d) 462.

229. Attorney-General v. De Keyser's Royal Hotel Ltd. [1920] A.C. 508 at 542.

> status" unless the language in which it is expressed requires such a construction."[230]

The facts of the Manitoba Fisheries case may be shortly stated. The plaintiffs owned and operated a successful fish exporting business. Under the terms of the Fresh Water Fish Marketing Act,[231] a government monopoly was created and the plaintiffs did not receive the licence which would have enabled them to continue their business. The Act authorized the payment of compensation for the plant and equipment rendered unnecessary by the Act but the plaintiffs did not receive compensation. They claimed an amount for the loss of their business, including an amount for goodwill. The statute did not contemplate or authorize compensation for goodwill so there was no statutory basis for this claim.

The observation by judges at all levels that the appellants had been poorly treated may have affected the reasoning of the

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230. Spooner Oils Ltd. v. Turner Valley Gas Conservation Board supra n. 12 at 552.

231. Fresh Fish Marketing Act, R.S.C. 1970, c. F-13.

Supreme Court.[232] The ratio of the Supreme Court decision is found in the following passage:[233]

> "There is nothing in the Act providing for the taking of such property by the Government without compensation and as I find that there was such a taking, it follows, in my view, that it was unauthorized having regard to the recognized rule that "unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation."

The Court awarded compensation for the loss of the plaintiff's goodwill but is unclear on what basis this award was made in light of the statute's limited compensation provisions.[234] The dicta of Mr. Justice Ritchie suggest that he adopted the

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232. 72 D.L.R. (3d) 756, [1977] 2 F.C. 457, aff'd 78 D.L.R. (3d) 393, [1978] 1 F.C. 485. Ritchie, J. approved Mr. Justice Collier's statement found at page 768:

> "On the evidence before me, the plaintiff and his former competitors, to my mind, have been unfairly treated. They are taxpayers and citizens of both Manitoba and Canada, entrapped in policy differences between two levels of Government. They have been economically erased."

233. Manitoba Fisheries, supra n. 228 at 473.

234. D.P. Jones, "No-Expropriation Without Compensation: "A Comment on Manitoba Fisheries v. The Queen" (1978) 24 McGill L.J. 627 at 633 where the author reminds us that all "damna are not injuria".

principle as a rule of construction, but the actual award points to an acceptance of the views expressed by Lord Radcliffe in Belfast Corp. v. O.D. Cars Ltd.:[235]

> "On the one hand, there would be the general principle, accepted by the legislature and scrupulously defended by the courts, that the title to property or the enjoyment of its possession was not to be compulsorily acquired from a subject unless full compensation was afforded in its place. Acquisition of title or possession was "taking". Aspects of this principle are found in the rules of statutory interpretation devised by the courts, which required the presence of most explicit words before an acquisition could be held to be sanctioned by an Act of Parliament without full compensation being provided, or imported an intention to give compensation and machinery for assessing it into any Act of Parliament that did not positively exclude it."

It can be argued that in Manitoba Fisheries the Supreme Court was merely stretching the terms of the statute to do justice. Arguably, it did not intend to set the foundations of a new theory of recovery without further discussion but the terms and outcome of the decision may not permit one to dismiss it so lightly.

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235. [1960] A.C. 490 at 523.

The Manitoba Fisheries decision has not been consistently interpreted in subsequent cases. The earlier decisions from Quebec suggest that the case merely reiterated the principle as a rule of construction.[236] In contrast, some of the more recent decision from the western provinces have held that the principle confers a substantive right to compensation which can be enforced in the courts. In Bodner Fish Dist. Ltd. v. The Queen[237] the plaintiffs were fish producers in the same position as Manitoba Fisheries. The case arose out of an ambiguity in the Supreme Court's method of calculating the amount of compensation dictated by the Manitoba Fisheries decision. The Federal Court supplied the necessary qualification and explained the decision in Manitoba Fisheries in the following manner.[238]

> It is interesting to note that the Supreme Court of Canada, although it approved and adopted the reasoning in the House of Lords in Central Control Board (Liquor Traffic) v.

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236. Ferme Filiber Ltée v. R. [1980] 1 F.C. 128; Proc. Gen. du Que v. Healey [1979] C.S. 286. In Healey however, the court decided the case on the ground that the statute was not intended to have a retroactive effect because its wording was not sufficiently explicit. The fact that it was an amendment to a statute which was itself retroactive did not alter the court's finding.

237. This case was joined with Canadian Fish Producers Ltd. v. The Queen at (1981) 113 D.L.R. (3d) 644.

238. Id., at 647.

> Cannon Brewery Co. Ltd., [1919] A.C. 744, on the principle that where the effect of the statute amounts to expropriation, unless it so specifies to the contrary, the intention to compensate for the loss is to be imputed to the Legislature, it did not follow the rule laid down in that case as to the means of ascertaining or computing that compensation. In both cases, the Courts came to the conclusion that the terms of the existing expropriation statue did not specifically cover the case under consideration. In the English case the relevant statute was the Land Clauses Act and in the Manitoba Fisheries case the statute would be the Expropriation Act as it existed on May 1, 1969 [now R.S.C. 1970, c. 16 (1st Supp.)]. The House of Lords held that the method of ascertaining compensation provided for in the Land Clauses Act would apply because "it was not expressly or impliedly excluded" from that Act. The Supreme Court of Canada, on the other hand, chose not to apply the method provided in the Expropriation Act because the situation was not specifically covered by that Act and devised instead the formula which I have quoted at the outset and which will most likely serve as a precedent in the case of businesses similarly affected by the action of Government and which do not fall within the terms of the Expropriation Act.

This supports the contention that a substantive right was envisaged in Bodner because the loss was not compensable under

either the Expropriation Act or the Fresh Water Fish Marketing Act. The similarities between Bodner and Manitoba Fisheries may weaken the force of this statement because the two cases are on all fours and the Supreme Court decision must have been considered as binding in Bodner.

A stronger case favouring the substantive right interpretation is Gloucester Prop. Ltd. v. R.[239] It addressed rights to compensation resulting from an order-in-council which restricted the uses the plaintiff could lawfully make of his land. The court referred to the common law principle as a "canon of construction" but held that the plaintiff had a right to compensation even though the statute did not expressly provide for one.:[240]

> . . . an intention to take away the property of a subject without giving to him a legal right to compensation for the loss of it is not to be imputed to the Legislature unless that intention is expressed in unequivocal terms . . . where the statute authorizing the taking away of, or causing damage to, the subject's property, either does not provide a special tribunal to assess the amount of the compensation the subject is to receive, or only provides a tribunal which has become non-

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239. (1980) 116 D.L.R. (3d) 596.

240. Id., at 607 and 608. The statute was the Environment and Land Use Act R.S.B.C. 1979, c. 110 s. 6.

> existent, the subject is entitled to have that amount assessed in the High Court of Justice . . .

It should be noted that whether or not the principle is one of construction or law, it can be overridden by an express legislative statement abrogating compensation rights.[241] The ambiguity persists, however, in situations where the statute does not provide any statement on compensation or does not expressly provide for the type of compensation claimed by the plaintiff.

It is unfortunate that the plaintiff's counsel conceded that there was no common law right to compensation in the case of Tener v. The Queen[242] which will be dealt with in detail below. That case dealt with the expropriation of Crown granted mineral claims and is presently on appeal to the Supreme Court of Canada. Counsel's concession means that the Supreme Court will not be forced to comment on its earlier decision in Manitoba Fisheries, but it is to be hoped that it will use the opportunity to clarify it.

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241. See R. v. Maritime Law Books Ltd. (1982) 60 C.P.R. 43.

242. (1982) 34 B.C.L.R., 285. (1981) 23 B.C.L.R., 309.

2. The Expropriation Act

If there is no common law right to compensation an interest holder must point to some statutory provision which expressly or impliedly redresses the plaintiff's damage.[243] Sometimes the statute which grants the expropriation power establishes compensation rights either by an express provision or by incorporating the compensatory provisions of another statute. In either case, the expropriatory statute is the starting point to determine the existence and extent of an interest holder's rights to compensation.

The Mines and Minerals Act gives the Minister two separate but similar powers of expropriation. Under section 10(1)(c) the Minister may accept the surrender of, cancel or refuse to renew an agreement when he is of the opinion that further exploration or development is not in the public interest. This power is expressly "subject to the payment of compensation" as set by regulation by the Lieutenant Governor in Council.[244] These regulations

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243. E. Todd, The Law of Expropriation and Compensation in Canada (1976) 264.

244. This is an interesting provision because the statute does not necessarily give a licensee the "right" to renew so it is difficult to imagine why the licensee should have a right to compensation if the Minister refuses renewal on the grounds of public interest. The Petroleum and Natural Gas Licence Regulations does not give the right to renew, it merely states, in s. 6(3), that the Minister may extend a two year term for an additional year. The power to make regulations

would be the starting point for a claimant under this section. If, however, the regulation did not provide compensation for a particular loss a plaintiff may have an alternative claim under the Expropriation Act. The existence of this alternative claim depends upon whether the provisions in the Mines and Minerals Act were intended to constitute a complete compensation code for expropriations arising under it. If the provisions were so intended then the Expropriation Act would not apply. The courts determine intention by reviewing the wording of the statute and if they see that the statute does not compensate for a particular type of loss they often interpret it as an indication that the statute was not meant to establish a complete code.[245] Thus, even when the expropriating statute provides for compensation the Expropriation Act may still be relevant.

When the expropriating statute does not mention compensation, the Expropriation Act applies.[246] Under section 10(1)(b) the Minister may expropriate any estate or interest in mines and

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concerning renewals is given to the Lieutenant Governor in Council by s. 106(2)(c). Maybe the presence of a section like s. 10(1)(c) suggests that the Act envisaged that renewals would be granted as a matter of right.

245. This reasoning was accepted by the British Columbia Court of Appeal in Tener v. R. supra n. 242.

246. If the statute abrogates compensation rights the Expropriation Act does not apply but there is no such abrogation in the Mines and Minerals Act.

minerals if he believes that further exploration and development are not in the public interest. There is no compensation provision for this subsection so a dispossessed interest holder must fall within the terms of the Expropriation Act or his losses will be damnum absque injuria.

There is an identity of subject matter between the Minister's power to expropriate under s. 10(1)(b) and the application of the Expropriation Act. In both cases the statute refers to "any estate or interest" in either the mines and minerals or the land[247] but protections in the Expropriation Act only extend to "owners" of "expropriated" "land". The definitions in the Expropriation Act are generally wide enough to encompass Crown petroleum and natural gas licensees and lessees but only if their rights constitute "interests in land". This question was discussed in Chapter II and it was my conclusion that licences and leases created interests in land in the nature of a profit a prendre because they transfer the right to win and work provincially owned substances. There is, therefore, the possibility of a remedy under the Expropriation Act but the dispossessed interest holder must be able to show that his interest was "expropriated".

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247. Expropriation Act, supra n. 244 s. 1(g).

F. Rights to Compensation

Expropriation is the greatest threat to interest holders' security and they are keenly interested in how far governments can interfere with acquired rights before they can claim the remedies available when property is expropriated. The negative effects of interference with vested interests can be partially mitigated by an award of compensation. In many cases governments negotiate ad hoc compensation settlements with affected interest holders but the strict legal rights of interest holders still retain their importance. They will govern if negotiations do not result in a settlement and they will be the basis of both parties' bargaining positions. An interest holder's legal rights depends on how the courts define certain legal concepts. The breadth of the interpretation given to the concepts of expropriation and injurious affection have a direct bearing on the interest holder's security of tenure and the price of the government's flexibility.

If courts hold that many government activities are expropriatory then the attendant rights to compensation increase security of tenure but augments the financial costs of government flexibility. Conversely, if the concepts of expropriation and injurious affection are narrowly construed then few midstream legislative variations will result in compensatory obligations. A narrow construction of these concepts reduces security of tenure by allowing changes to vested rights without imposing correlative Crown responsibilities. An interest holder's security of tenure

is best protected when a legislative variation amounts to an expropriation and he has a right to compensation. When he receives compensation he is no longer individually assuming the costs of legislative measures introduced in the public interest. The following discussion suggests that very few midstream changes effected under the Mines and Minerals Act will amount to an "expropriation", as presently defined by the courts, so interest holders have only limited or no rights to compensation.

1. Expropriation

The courts have generally adopted a narrow view of what amounts to a compulsory taking of property. The generally accepted test provides that each of three interrelated requirements must be met before there is an expropriation. The first requirement is based on the distinction between confiscatory and regulatory powers, the second requires a change in beneficial ownership, and the third is that the Crown must acquire the rights in issue before there is an expropriation. Often courts do not articulate the tests in these terms or they use those requirements interchangeably, so while it is somewhat artificial to study each requirement separately the exercise retains some merit.

These requirements may be illustrated by reference to the recent case of Tener v. The Queen and other relevant decisions. The Tener decision is very important, not only because it is on appeal to the Supreme Court of Canada, but because it is one of

the few cases which raises the issue of midstream legislative variations to resource rights granted by the Crown.

(a) Tener v. The Queen

This case resulted from a Crown grant of mineral claims to Tener's predecessor in title. When the claims vested in 1937, the owner had the right to all of the minerals within the claims and the right to use and possess as much of the surface as was necessary to win and work the claims. The mineralisation in this case consisted of gold, silver, and lead deposits. The claims were always kept in good standing although there was no production. In 1939, a notice of reserve appeared in the British Columbia Gazette stating that all vacant Crown lands within a certain area, including Tener's claims, were reserved as Wells Grey Provincial Park. Nothing in this notice affected the plaintiff's ownership of his claims. In 1965, a new Park Act was enacted which provided that park use permits were necessary before mineral extraction could occur.

The availability and the terms and conditions of these permits depended upon the classification of the park. Initially, Wells Grey was a Class B park, where it was possible to receive a permit only if the resource activities were not detrimental to the park's recreational values, but no permit was granted during this period. Two legislative amendments were made in 1973: one to the Mineral Act, providing that anyone engaged in mineral activities

in parks required the permission of the Lieutenant Governor in Council; the other to the Park Act, placing Wells Grey into the more protected category of a Class A park. Permits could only be granted for activities within Class A parks which "were necessary to the preservation or maintenance of the recreational values of the park."

Tener applied for a park use permit in 1973 and each year up to and including 1977, but never received one. In 1978, he received a letter from the Parks and Recreation Branch stating that provincial policy prohibited resource development within Class A parks and that no permit would be forthcoming. The government did discuss the possibility of compensation by requesting an itemized quit claim, but nothing resulted from these efforts. The plaintiffs treated this letter as the event which deprived them of their opportunity to exploit their claims. They subsequently began an action which proceeded by way of a stated case on the issue of the government's liability for compensation.

Tener claimed that the refusal of a park use permit was an expropriation of his right to develop his minerals by denying him access to the surface of the land. He argued that the refusal rendered his ownership rights worthless because it restricted his right to win and work his minerals. He based his right to

compensation on the terms of the British Columbia Park Act[248] and the Expropriation Act,[249] and claimed compensation alternatively for the expropriation of, or injurious affection to his claims. The Park Act provides that "expropriations" made under it would be compensated according to the provisions in the Ministry of Highways and Public Works Act.[250] The incorporated Act only gives compensation for "expropriations". In contrast, the British Columbia Expropriation Act applies to takings of land authorized by statute and provides for compensation in cases of expropriation and injurious affection, as long as the loss results from the "execution of works".

The trial court held that his rights had not been expropriated or injuriously affected. The Court of Appeal held that his claims had not been expropriated but awarded compensation on the alternative ground of injurious affection. Both courts relied upon the three requirements for an expropriation and formulated a narrow principle of what constitutes an expropriation. The first requirement was raised by the trial judge; the latter two are reflected in Mr. Justice Lambert's holding that there was no

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248. Park Act, R.S.B.C. 1979, c. 309.

249. Expropriation Act, R.S.B.C. 1979, c. 117.

250. Ministry of Highways and Public Works Act, R.S.B.C. 1960, c. 109, now Highway Act, R.S.B.C. 1979, c. 167.

expropriation as Tener retained the ownership of his claims and the Crown acquired nothing by the refusal of the park use permit.

(b) Confiscatory v. Regulatory Powers

The trial judge, Mr. Justice Rae, reasoned that there had been no expropriation of the plaintiff's claims because the refusal of the permit merely suspended his mineral and surface rights without confiscating them. He classified the power to grant or refuse a permit and the actual grant or refusal as matters of regulation, not expropriation.[251] In doing so, he relied on the distinction between confiscatory powers and regulatory powers.[252] This distinction is based on the belief that certain statutory powers deal with matters of expropriation, whereas others deal with purely regulatory matters. It is quite easy to draw this distinction between the power to take land for a public highway and the power to determine the appropriate speed limit but not all powers fall so clearly into one category or the other.

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251. Supra, n. 242 at 737.

252. This same type of distinction is made in the United States. For the purposes of the Fifth and Fourteenth Amendments the courts ask whether measures were imposed under the police power (regulation) or resulted from an exercise of the government's powers of eminent domain (expropriation).

In any event, it is artificial to focus on the statutory power rather than the effect of its exercise. First, there is no *a priori* difference between the two types of powers and second, the courts often classify the power according to its effect anyway. An important question in this area, illustrated by the example of land use restrictions, is the point at which regulation becomes a *de facto* confiscation. The trial judge's distinction between confiscation and regulation intimated that they were mutually exclusive whereas the difference is just one of degree and the proper course would have been to analyze the effect of the legislation on Tener's rights.

It appears that governments increasingly use allegedly regulatory powers to effect essentially confiscatory ends. In some quarters this has led to the extension of expropriation concepts to include this type of "regulation", which has become known as "creeping expropriation" and "constructive taking".[253] These

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253. For a general discussion see:

B. Christie, "What Constitutes a Taking of Property under International Law?", 38 Brit. Y.B. Int'l L. 307 (1962).

Burns H. Weston, "'Constructive Takings' under International Law: A Modest Foray into the Problem of 'Creeping Expropriation'", 16 Va. J. Int'l L. 103 (1975-76).

Errol P. Mendes, "The Canadian National Energy program: An Example of Assertion of Economic Sovereignty or Creeping Expropriation in International Law", (1981) 14 Vand. J. Transnat'l L. 475 at 495.

concepts are the invention of international law. Their application in Alberta may be limited to examples of how courts could extend the concept of expropriation if they chose to do so.

(c) Change In Beneficial Ownership

It is difficult to escape the dichotomy between regulatory and confiscatory powers as it is reinforced by the second requirement of a change in beneficial ownership. The interplay between these concepts generally occurs in the following manner: When government actions involve a change of beneficial ownership they are normally classified as exercises of confiscatory powers, whereas variations which leave ownership rights relatively intact are classified as the use of regulatory powers.[254]

All of these concepts were introduced at a time when only physical invasions of property qualified as takings. However, now it is generally recognized that a confiscation can occur without a change in beneficial ownership. An early recognition of this principle is contained in a famous passage in the Fisheries decision which dealt with the distribution of legislative powers:[255] "The suggestion that the [regulatory] power might be

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254. W.B. Stoebuck, Non-Trespassory Takings in Eminent Domain, (1977), 1 to 20.

255. A.G. Can. v. A.G. Ont., [1898] A.C. 700 at 712 to 713.

used as to amount to a practical confiscation of property does not warrant the imposition by the Courts of any limit upon the absolute power of legislation conferred."

The major issue raised by this second requirement is whether or not the confiscation of one of the rights consequent upon ownership is an expropriation of the whole. In Tener's case, the question is whether deprivation of his surface right and right to produce amounts to an expropriation of his interest even though he retains the ownership of his mineral claim? To answer this question guidance can be taken from cases decided in countries which prevent the expropriation of property under specific enactments or by their Constitutions. In many of these cases, this limited form of confiscation is not sufficient to establish a taking.

In France Tenuria and Co. v. The King[256] the plaintiffs claimed compensation under both the Emergency Powers Act and the common law alleging that the government requisitioned their ship. On day 1, the British government told the plaintiffs not to discharge the coal they were carrying. On day 22, after lying in wait, the ship was ordered elsewhere to deliver the coal which had been formally requisitioned in the interim. The coal was

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256. France Tenuria and Co. v. The King, [1927] 1 K.B. 458.

delivered on day 23. The plaintiffs alleged that compensation for the use of the ship was owing for all twenty-three days. The court held that the order to proceed to another port on day 22 supplied the positive and effective dominion required by the Emergency Powers Act so compensation was only awarded starting from the formal requisitioning on day 22. No compensation was given for days 1 through 22 because the plaintiff was merely following the order of the government and did not lose the ownership of any of his property. In holding that there was no common law claim for the remaining days, Wright J. wrote:[257]

> . . . but I shall assume that the Crown has no right at common law to take a subject's property for reasons of State without paying compensation. I think, however, that the rule can only apply (if it does apply) to a case where property is actually taken possession of, or used by, the Government, or where, by the order of a competent authority, it is placed at the disposal of the Government. A mere negative prohibition, though it involves interference with an owner's enjoyment of property, does not, I think, merely because it is obeyed, carry with it at common law any right to compensation. A subject cannot at common claim compensation merely because he obeys a lawful order of the State.

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257. Id., at 467.

Similarly, in Belfast Corp. v. O.D. Cars Ltd.,[258] the court construed a constitutional provision which prohibited taking 'any property without compensation', 'either directly or indirectly.' Viscount Simonds, while recognizing that the difference between regulation and confiscation is one of degree, favored a test based on the public interest involved. The more compelling the public interest, the more likely measures which interfere with proprietary rights will be classified as regulatory. In the course of his judgment, he remarked:[259]

> . . . I hope that I do not over-simplify the problem, if I ask whether anyone using the English language in its ordinary signification would say of a local authority which imposed some restriction upon the user of property by its owner that the authority had 'taken' that owner's 'property'. He would not make any fine distinction between 'take', 'take over' or 'take away'. He would agree that 'property' is a word of very wide import, including intangible and tangible property. But he would surely deny that any one of those rights which in the aggregate constituted ownership of property could itself and by itself aptly be called 'property' and to come to the instant case, he would deny that the right to

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258. Belfast Corp. v. O.D. Cars Ltd., [1960] A.C. 490 (P.C.).

259. Id., at 519 and 520.

> use property in a particular way was itself property, and that the restriction or denial of that right by a local authority was a 'taking', 'taking away' or 'taking over' of 'property'.

These cases suggest that more than a surface use restriction like the one imposed on Tener's claims would be necessary before a taking would occur. The dicta establish that interference with a composite right of ownership may be insufficient to establish a taking but the focus should be upon what, if any rights, the plaintiff may still usefully exercise.

The controversy is further illustrated by the zoning by-law cases. These cases decided that land use prohibitions contained in by-laws did not amount to expropriations, even though the rights of land owners to use their property were curtailed and property values thereby diminished.[260] The courts reasoned that as there had been no change in the beneficial ownership of the property, there had been no expropriation. Following the

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260. Taylor Blvd. Realties Ltd. v. Montreal, [1964] S.C.R. 195, affirming [1963] Q.B. 839; Toronto Corporation v. Roman Catholic Separate Schools Trustee, [1926] A.C. 81, [1925] 3 D.L.R. 880; Canadian Petofina Ltd. v. Martin and Ville de Saint-Lambert, [1959] S.C.R. 453, 18 D.L.R. (2d) 761. In the U.S. the leading case is Village of Euclid v. Ambler Realty Co. (1926), 272 V.S. 365. See W.B. Stoebuck, supra, note 28 at 172 et seq. Presently, under the Planning Act R.S.A. 1980, C. P-9, s. 136 compensation is expressly denied for damages caused by zoning restrictions.

reasoning of those decisions, the refusal of a park use permit or any other permit required by legislation would merely prevent the plaintiff from exercising all of the rights consequent on his ownership of the claim, but there would be no expropriation.

There are, however, two reasons why the zoning cases should not constitute the final statement on this issue. First, it has been argued that nuisance abatement and the preservation of the greatest good for the greatest number were the reasons why zoning enactments were not takings.[261] The land owner was prevented from using his land in a particular manner and while his rights may have been reduced or rendered less valuable, the underlying assumption was always that he could make an alternative use of the land. This argument can not be made with respect to resource rights as they are granted for a particular purpose. The only reason why claims are located or why companies bid for permits or licences is to have rights in and access to the subsurface estate. When a permit prohibiting surface access is refused, there is no alternative use the interest holder can make of the property. It is not that there is no equally advantageous use, it is that there is no alternative use at all. Second, the zoning cases were decided at a time when zoning was very limited, was usually

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261. J.L. Sax, "Takings and the Police Power", (1964-65) 74 Yale L. J. 36 at 49.

effected by municipalities, and did not greatly alter property values. The growing use of powers of this sort, by all levels of government and for numerous purposes, may make the cases inappropriate in the modern context.[262]

(d) The Crown Must Acquire The Rights In Issue

The third major requirement is that the Crown must actually acquire the rights in issue before there can be an expropriation. Certain case law requires a one-to-one ratio between deprivation and gain although it should not be theoretically necessary for an expropriation.[263] The main issue for this requirement is whether the emphasis should be on what the subject has lost or on what the government has acquired. In Manitoba Fisheries v. The

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262. P. Bretts, "Expropriation Without Compensation", [1973] Bus. Quarterly 5. This point is especially important as new tests are being proposed to differentiate the legal effects of zoning according to the purposes it seeks, at 5. For a case giving compensation for mineral claims see Province of New Brunswick v. Gordon and Walton (1980), 27 N.B.R. (2d) 110 (N.B.Q.B.).

263. See Gov't of Malaysia v. Selangor Pilot Assoc., [1977] 2 W.L.R. 901 (P.C.) where Viscount Dilhorne at 907 and 908 stressed that while the plaintiffs suffered a deprivation, the property was not acquired by the government, so no compensation was awarded. He was however, construing a provision of the Malaysian Constitution which emphasized acquisition. Article 13(2) reads: "No Law shall provide for the compulsory acquisition or use of property without adequate compensation."

It has also been argued that what was really at issue in that decision was whether the plaintiff's rights constituted property at all.

Queen,[264] the federal government created a statutory monopoly and the issue was whether the Crown had expropriated the plaintiff's goodwill as well as the physical assets of his business. Ritchie, J., emphasized the acquisition by the Crown rather than the deprivation of the subject. The operative assumption of that decision was that an acquisition was necessary.[265]

> Once it is accepted that the loss of the goodwill of the appellant's business which was brought about by the Act and by the setting up of the Corporation, was a loss of property and that the same goodwill was by statutory compulsion acquired by the federal authority, it seems to me to follow that the appellant was deprived of property which was acquired by the Crown.

In Ferme Filiber Ltée v. The Queen[266] the plaintiff operated a fish hatchery for five years under a licence granted by the

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264. Manitoba Fisheries v. The Queen (1978), 88 D.L.R. (3d) 462 (S.C.C.) at 468.

265. Mr. Justice Ritchie disagreed with the view sustained both at trial and appeal that while the effect of the legislation was to extinguish the appellant's goodwill, it was nevertheless not "taken" by the Crown. He disagreed, however, on the facts of the case, and not as a matter of legal principle. This is illustrated by his reliance on the monopoly granted, forcing all previous clients to deal with the Crown corporation. Once it was established that the plaintiffs had created goodwill, the acquisition was assumed.

266. [1980] 1 F.C. 128.

federal government in accordance with the Fisheries Act.[267] The government subsequently amended the Regulations and prohibited the rearing of fish in an area which included the plaintiff's hatchery. Its operating licence was not renewed and it was forced to cease operations. The plaintiff argued that the adoption of this regulation constituted a disguised expropriation for which he was entitled to receive compensation. The court held that there had been no expropriation because "an expropriation implies dispossession of the expropriated party and appropriation by the expropriating party; it necessarily requires a transfer of property or rights from one party to the other. There is nothing of that kind here. Defendant has not acquired anything belonging to plaintiff."[268]

The parallels between the position of the plaintiff and licensees and lessees under the Mines and Minerals Act are clear. In both cases the Crown owns the property and grants limited rights of use. The failure to renew, where there is no right to renewals, can never amount to an expropriation because the Crown acquires nothing it does not already own. The government's purpose behind not granting a right of renewal is to retain flexibility and this would be lost if the failure to renew was

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267. R.S.C. 1970, C. F-14.

268. Id., at 130.

somehow actionable. Where there is a right to a renewal, or the Crown attempts to terminate an unexpired interest by a legislative amendment, then the Crown acquires the power to regrant rights in its property or deal with it as it sees fit. This is a power it would not possess during the currency of licences and leases. It is unclear whether the acquisition of this power is or should be sufficient to satisfy the current appropriation requirement.

In certain cases, however, an expropriation may not result even if the right to regrant the confiscated rights is used as the test. In Tener the Crown acquired nothing because Tener retained the title to the claims so the Crown could not reopen the lands for mineral staking. Nor did the Crown acquire the power to regrant surface rights because it was retained from the outset.[269] But while the Crown did not acquire rights of regrant, it enjoyed the benefit of designating lands for public use. It is unlikely, however, that this type of benefit will ever be sufficient to constitute the necessary acquisition by the government as long as a change in beneficial ownership is retained as the second requirement of an expropriation.

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269. See Newmont Mines v. The Queen in Right of British Columbia et al (1981), 124 D.L.R. (3d) 710 (B.C.S.C.).

There has been one recent indication that the courts may be prepared to take a wider view of this requirement. In Gloucester Properties v. The Queen[270] the court held that the plaintiff had a right to compensation for the losses caused by the land use restrictions imposed by order in council but that he had not exercised it properly. In the course of this judgement it was recognized that the Lieutenant Governor in Council had been given the statutory power to place limitations on the plaintiff's common law rights to use his land. Bouck J. remarked, however,[271] "His orders may be of such a nature as to amount to expropriation even though the land is not actually acquired by the Crown." This judicial attitude emphasizes the effect of legislation on private rights, rather than any benefit to the government.

(e) Criticisms

This narrow view of expropriations does little to promote security of tenure and much to encourage government flexibility. From the tests used to determine what an expropriation is, it appears that the ambit of "regulatory" changes open to the government is very wide indeed. The increased use of regulatory powers which alter common law proprietary rights has prompted one writer to the belief that our present conception of property is changing.

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270. (1980) 116 D.L.R. (3d) 596.

271. Id., at 607.

The increased user limitations suggest that "absolute ownership" now means whatever rights are left over after legislative inroads have been made.[272]

The limited protection given to licensees and lessees from this three pronged test of an expropriation can be seen when the question is asked whether the major variations imposed in recent years qualify as compensable takings. It is unlikely that the petroleum production cutbacks, the royalty increases, the introduction of deep rights reversion or the changes in the tenure system generated any compensatory obligation, even though the companies argued that their vested rights had been altered. These examples sharply illustrate that not every interference with acquired rights amounts to an expropriation in law.

Affected companies argued that the effects of the cutbacks were confiscatory because the government did not retain the power to curtail production in their original leases. According to the stated expropriation requirements a plaintiff must establish that his ownership rights have been acquired by the government through the use of its expropriatory powers. This would be difficult in the case of the production cutbacks as the Alberta government

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272. P.V. Bretts, "Can the Entrepeneur Survive in the Seventies" (1972) 37 Bus. Q. 1:14 at 16.

merely suspended the operation of one of the rights transferred by the grant. A claimant could not establish why reduced production expropriated his whole interest. Nor could he establish that he had an absolute right to produce because the rights granted by the Mines and Minerals Act are qualified by the ERCB quota system.[273] It is also very difficult to classify a temporary

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273. The companies would rely on the difference in extent, source and nature between the cutbacks and allowables to establish their claim that their vested rights had been altered. In this context it is important to note that the fifteen percent reduction was on the figure which would otherwise have been the province's allowable and not fifteen percent of all oil which could possibly have been produced. This fortifies the companies' argument as it illustrates a taking over and above the ERCB quota system. The companies entered into agreements where the only source of limitation on production was the setting, by the ERCB, of the allowables for the province, the pools and individual wells. The substitution of the Lieutenant Governor in Council, under a separate Act, distinguishes it from the existing administrative body and make its actions in derogation of vested rights.

    The nature of the quota is also significantly different. The actions of the ERCB are motivated by a genuine concern for conservation, a desire for proper management and supply/demand exigencies. Despite the rhetoric involved it is hard to classify the cutbacks as anything other than a political maneuver calculated to strengthen the province's bargaining position. It appears somewhat inequitable to allow a political play to be made without what would otherwise be the attendant ramifications and obligations merely because it resembles an existing regulatory system. Thus the companies would argue that their initial agreements granted the right to produce subject only to ERCB control and the cutbacks involve a confiscation of this right by the imposition of alternative and added controls.

    There is the argument that since the cutbacks could have been effected under ERCB orders the companies case is one of form and not substance. The short answer is that had the government proceeded in that manner they would have faced

measure as an expropriation.[274] There is little doubt that the production cutbacks altered vested interests, but the government's interference was not expropriatory.[275]

Similarly, while royalty increases directly affect profitability, they clearly do not qualify as expropriations under the suggested test. A stronger case can be made that the reversion of deep drilling rights is confiscatory as the lands available to the lessee are reduced. This argument would avail a limited class of lessees[276] and it may be difficult for them to establish that the government was acting under an expropriatory power. The

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opposition from freeholders, and one must accept both the positive and negative aspects of a course of action.

274. Writing at the international level suggests that temporary measures cannot amount to an expropriation, but may only ripen into an expropriation with the passage of time. See Christie, supra n. 253 at 317.

275. In Spooner Oils supra n. 12 the Court concluded that a reduction in Spooner's right to produce naptha "affected" the terms of the lease in a manner not authorized under section 2 of the Natural Resource Transfer Agreement. That Agreement is helpful when ascertaining what constitutes an interference with vested interests but it cannot be used as a test of what constitutes an expropriation.

276. The reversion provisions were introduced in 1976 but operated only in 1981. Post 1976 lessees knew that some time in the future the reversion provision could reduce their holdings. It is only pre 1976 lessees who could claim that reversion is expropriatory because they received the right to drill and produce within the location, without reference to the deepest producing zone.

changes to the tenure system,[277] were effected with little violence to acquired rights even though the government imposed new drilling requirements on reservation and permit holders. It is unlikely that the drilling obligations would be classified as anything other than "regulation", even though failure to comply carries a sanction of cancellation.

This narrow view of an expropriation will not prevent recovery for the type of injury suffered by Tener or other interest holders where the statute provides for compensation for injurious affection. Where there is no such provision, it is unlikely that the courts' conception of expropriation adequately protects the property rights of individuals or mitigates against the capricious exercise of governmental powers. As we will see in the next section the Alberta Expropriation Act merely compensates for "takings" and there is no provision providing compensation arising from injurious affection.

The definition of expropriation may also affect the scope of any common law right to compensation which may exist. This suggests that a wider view could and perhaps should be taken to include constructive takings within the concept of expropriation. This is especially true as it is more likely that an interest

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277. For a discussion see Chapter II.

holder will suffer loss through a constructive taking than an outright expropriation as most regulation merely affects the participation in, use of, and benefit or yield of the property rather than its beneficial ownership. The emphasis should be on the economic effects of the legislation on acquired interests, whether the public benefit from the purposes and effects of the legislation and what role the government is playing when it enacts the legislation.

2. Injurious Affection

Injurious affection is a heading of damage particular to expropriation law. It is used to signify several different types of damage but the underlying idea is that it represents the damage suffered when a statutory power has been exercised. Three types of damage have been identified as falling within the scope of injurious affection:[278]

1. Where part of the owner's land is expropriated, the pieces of land remaining may be rendered less valuable as a result of their severance from the expropriated portion.

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278. E. Todd, supra n. 243 at 267 and 268. See also E. Todd, "The Mystique of Injurious Affection in the Law of Expropriation" (1967) U.B.C.L. Rev. (Centennial Edition) 127.

2. Where part of the owner's land is expropriated and the pieces of land remaining are rendered less valuable as a result of the actual or intended use made of the expropriated portion.

3. Where none of the owner's land has been expropriated but loss results from the lawful activities on neighbouring land which may or may not have been expropriated.

In this section we will only discuss the third type of damage. It is known as "injurious affection simpliciter" because it is not contingent on an expropriation, as are the other two. A prospective claimant would not be required to meet the difficult burden of proving a confiscation of beneficial ownership before he could claim compensation. This is the type of claim which succeeded in the British Columbia Court of Appeal in the Tener case and it initially appears to be the most promising avenue of recovery for holders of resource rights who have suffered loss due to midstream legislative amendments.

The Alberta Expropriation Act, however, seriously limits recovery for injurious affection, and thereby closes this avenue of recovery to interest holders under the Alberta Mines and Minerals Act. The Act allows compensation for injurious affection only if there has also been an expropriation. The Act only provides compensation for the first two types of injurious affection. Section 42(2) states:

> When land is expropriated, the compensation payable to the owner shall be based on
> (d) damages for injurious affection

This can be compared with the British Columbia legislation which grants a substantive right to recover for injurious affection simpliciter:[279]

> In estimating the money or compensation to be paid ... the damage, if any, to be sustained by the owner of the land by severing the land taken from the other land of the owner, or otherwise injuriously affecting the other land by the exercise of the powers of this or the special Act or any Act incorporated with it.

The difference between the Alberta and British Columbia legislation means that Tener would not have recovered if his case had been decided in Alberta.[280]

The provision in the Alberta Expropriation Act is fortified by s. 7 of the Proceedings Against the Crown Act.[281] This

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279. Expropriation Act, R.S.B.C. 1979, c. 117 s. 62.

280. In some cases, however, statutes specifically provide for injurious affection simpliciter. See the Municipal Government Act R.S.A. 1980, M-16, Beierback and Beierback v. Medicine Hat (1982) 18 Alta. L. R. (2d) 156.

281. R.S.A. 1980, c. P-18 s. 7.

section initially appeared as s. 15(1) in the Expropriation Procedure Act[282] and was inserted in the Proceedings Against the Crown Act when the earlier Act was repealed. It reads:

> An owner of land expropriated by the Crown and an owner of land injuriously affected by the exercise of the power of expropriation is entitled to due compensation for any damages necessarily resulting from the exercise of the power of expropriation beyond any advantage that he may derive from any purpose for which the land was expropriated or by which the land was injuriously affected.

In the Alberta Institute of Law Research and Reform Report on Expropriation the commissioners did not form a firm opinion on the desirability of recovery for injurious affection simpliciter, except to say that any claim where none of the claimant's land is taken does not belong in an expropriation statute.[283] It is therefore unlikely that there will be any legislative changes on this point.

Even if injurious affection simpliciter were actionable in Alberta, the requirements for recovery may not be met by the type

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282. R.S.A. 1970, c. 130 (repealed).

283. Institute of Law Research and Reform, Expropriation Report No. 12 University of Alberta, 1973 at 133.

of legislative variations traditionally made to licences and leases.[284] Thus, it appears that the one promising avenue of recovery has been closed by the Alberta Expropriation Act and Proceeding Against the Crown Act.

G. Conclusion

The previous discussion illustrates the relative strength of legislative sovereignty and the weaknesses of expropriation and injurious affection as a means of providing compensation for losses generated by midstream legislative changes. Interest holders under the Mines and Minerals Act enjoy a precarious security of tenure because their property rights receive no

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284. In R. v. Loiselle [1962] S.C.R. 624; 35 D.L.R. (2d) 274 the Supreme Court established four requirements before injurious affection simpliciter could be actionable:

(a) the damage must result from an act rendered lawful by statutory powers of the company;

(b) the damage must be such as would have been actionable under the common law, but for the statutory powers;

(c) the damage must be an injury to the land itself and not a personal injury or an injury to business or trade;

(d) the damage must be occasioned by the construction of the public work, not by its user.

These were met in the Tener case because the Court of Appeal reasoned that creating a park was a public work. It is difficult to see what the public work would be in cases like production cutbacks, royalty increases and deeps rights reversion.

constitutional protection and the judicial notions of expropriation are not wide enough to compensate for the interference with their vested interests. There is therefore a large area in which the government may enact legislative changes without engendering legal responsibility. The lack of a definite government policy on compensation can be traced to the imprecise legal position of an interest holder's claiming compensation and the difficult burden of proving an expropriation.

In many cases the government does not rely on its strict legal rights to expropriate property. It often uses its contractual or discretionary powers to effect policy changes and sometimes it negotiates ad hoc settlements with interest holders whose rights conflict with government policy. The political undesirability of expropriating private property rights is also a check on the government's power. The desire to maintain a healthy and stable investment climate is at the forefront of government concerns and may inhibit the use of its expropriatory powers.

CHAPTER VI

CONCLUSION

The goal of this thesis was to present how the Alberta government balances the competing needs of government flexibility and industry security of tenure in its tenure system for provincially owned petroleum and natural gas. The three main mechanisms used were studied in some detail and the obvious conclusion is that grantees enjoy a very limited security of tenure in the legal sense because of the diverse and powerful ways in which the government retains flexibility. This is not surprising in light of the inequality of bargaining power between the Crown in right of the province and its grantees and the generally accepted goals pursued by the province as the steward of publicly-owned resources.

The underlying tension in this area is between the sanctity of individual contracts and changing government needs. In part it emanates from the "sovereignty" of our legislative bodies, which if drawn to its logical conclusion, would prevent the formation of enforceable contracts between the State and individuals. Practical exigencies requiring that certain obligations, once assumed, should be respected, have led to the adoption of the judicial fiction of the Crown's dual capacities. Even though binding agreements with the Crown are possible, certain promises must nevertheless give way to what has become necessary in light of

intervening events. All governments face the dilemma of how to react to changed circumstances and different political and philosophical perceptions result in the choice of different legal devices.

To a large extent, the Alberta government tries to behave like a normal contracting party and rely on private law concepts in its dealings with its grantees. It can do so because there is no separate body of law which governs the contracts of public authorities and the rule of law prevails. There is much room for discussion on the applicability of private law concepts to the relationship between the Crown and its co-contractors. Private law concepts may be inadequate to redress the special powers, immunities and privileges enjoyed by the Crown and they obscure the fact that certain contracts are for public services where companies may owe some public duty to continue to perform.

The Crown relies on private law concepts when it exercises its contractual right to vary leases unilaterally. The Crown's contractual capacity is a judicial fiction designed to bind the Crown to certain of its obligations, but the Alberta government uses that capacity to give contractual force to provisions such as the compliance with laws clause and the variable royalty rate. It is paradoxical that it uses its contracting powers to avoid the binding obligations which impair government flexibility. These contractual variation devices have an enormous effect on security

of tenure. While they warn grantees of future contractual variations they may also prevent the vesting of legally recognized rights. It is difficult for grantees to obtain the legal and political protection given to acquired or vested interests when the lease document authorizes unlimited changes to even the most basic lease terms.

The Alberta government also relies on its wide discretionary powers to react to changing societal needs. The increased use and width of discretionary powers under the Mines and Minerals Act illustrates an ancillary reliance on public law concepts to secure flexibility, especially in relation to licences. Discretionary powers introduce administrative uncertainty but they evoke different attitudes and expectations in industry and government. There is so much discretion in modern legislation that grantees either believe it will be used in their favour or expect that as long as they adhere to the "rules of the game" they will be allowed to continue their operations. The government's administrative practice has become more important than the legal right it grants because discretion is so prominent and pervasive that the rights become almost meaningless.

Administrative practice is also important from the government's perspective because it tempers the uncertainty associated with discretionary powers. Regulators generally apply their decision-making powers consistently to encourage market stability

and sustain investor confidence. This promotes security of tenure but legally it is a voluntary concession which can be altered at any time. The underlying purpose of discretionary powers is to allow the choice of the alternative which best accords with government policy and the lure of consistency will readily give way to policy shifts generated by changed circumstances.

The current trend of active judicial review of administrative action contributes only slightly to security of tenure. While a grantee's administrative remedies ensure that discretionary decisions are made within the boundaries of jurisdiction, the restricted availability and scope of judicial review tends to limit the efficacy of administrative remedies in reducing the wide, flexible powers granted to the Minister. Administrative remedies encourage political accountability but an aggrieved interest holder will generally find little solace in exercising them.

The last mechanism used by the Alberta government is invoking its legislative capacity to alter the terms of grant retroactively. The competing needs of industry and government are sharply in focus over the issue of expropriation because legislative sovereignty is the Crown's most powerful weapon and expropriation without compensation is an interest holder's greatest fear. There is little doubt that most persons would agree that in a contest between a private interest and the public interest that the public

interest should prevail. There is not always agreement on whether an individual who shoulders a disproportionate share of the cost of the public interest should receive compensation. This issue is complicated in the present case because licensees and lessees only hold limited rights in publically owned resources.

The legal principles governing compulsory takings and the Crown's compensatory obligations are far from clear, especially when the statute does not specifically grant or refuse compensation. The legal principles adopted to define an expropriation do not protect interest holders under the Mines and Minerals Act from the type of interference normally introduced in the name of changed circumstances. Industry does not draw the fine legal distinctions necessary to differentiate a veritable expropriation from mere interference with an acquired interest. It focuses on the economic effects of legislative amendments on their projected profitability and not on whether the Crown has acquired anything from the retroactive legislation. Most negative industry comment on the current management scheme centers on the lack of protection for vested interests.

The government rarely resorts to retroactive legislative amendments to implement new policies because of its wide discretionary powers. When legislation is required it will often not amount to an expropriation in law and even when it does, the presence of the compliance with laws clause in leases either

validates the amendment as a contractual term or defeats the vesting required to sustain a claim that property has been expropriated. The Crown can rely on the public ownership of the resource to quell some of the criticism of interfering with the property rights of individuals, especially when those individuals are often large and sometimes multinational oil companies.

Each of the government's mechanisms goes a long way to safeguard the flexibility required in the public interest. The legal devices employed by and available to the Crown complement each other and tend to cover all types of flexibility which may be required by a government granting resource rights in provincially owned property. The defects of the contractual variation devices are solved by the simplicity and specificity of discretionary powers and any other defects can be addressed by the power to expropriate without compensation. Individually each mechanism undermines an interest holder's security of tenure and their cumulative effect is overwhelming. The fact that Alberta's oil and gas industry continues to be an important one illustrates that the relationship between the Crown and its grantees is a complex one whose political and economic aspects go beyond a strictly legal analysis.

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